

345
170

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 207.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

ANDY ARCHIBALD.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

FILED JULY 29, 1898.

(16,346.)



(16,346.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 207.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

ANDY ARCHIBALD.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from the circuit court of the United States for the eastern district of Texas	3	1
Caption	3	1
Transcript from State court	3	1
Original petition	3	1
Demurrer to petition	9	5
Petition for removal	9	5
Bond for removal	11	7
Order for removal	13	8
Judgment	13	8
Bill of exceptions	14	8
Testimony of Andy Archibald	14	9
L. K. Vance	16	10
W. G. Howell	17	10
C. E. Jones	19	12
J. G. Harris	20	12
George E. Hadley	21	13
J. G. Harris (recalled)	23	14

INDEX.

	Original.	Print.
Charge of the court	24	15
Defendant's requests to charge.....	26	16
Judge's certificate to bill of exceptions.....	28	17
Petition for writ of error.....	29	18
Assignment of errors.....	29	18
Writ of error.....	31	20
Bond on writ of error	33	20
Citation.....	34	21
Cost bill	35	22
Clerk's certificate.	36	23
Hearing and submission.....	38	24
Judgment	39	24
Petition for writ of error.....	40	24
Allowance of writ of error.....	42	25
Assignment of errors	43	25
Bond on writ of error.....	49	27
Copy of writ of error	52	28
Opinion	54	29
Clerk's certificate.....	62	32
Citation.....	63	32
Acceptance of service of citation.....	64	33

1 & 2 UNITED STATES OF AMERICA, {
Fifth Judicial District. }

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun and held, pursuant to law, on the third Monday of *of* November, A. D. 1895, in the court-room of said court, in the city of New Orleans, State of Louisiana, before the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit, the Honorable Aleck Boorman, United States district judge for the western district of Louisiana, and the Honorable Emory Speer, United States district judge for the southern district of Georgia.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error, }
v.
 ANDY ARCHIBALD, Defendant in Error. }

Be it remembered that heretofore, to wit, on the 22d day of November, 1895, a transcript of the record of this cause from the circuit court of the United States for the eastern district of Texas was filed in the office of the clerk of said United States circuit court for the fifth circuit, in the words and figures following, to wit:

3 Be it remembered, that on the 25th day of September, A. D. 1895, in the circuit court of the United States, in and for the eastern district of Texas, at Jefferson, Texas, in the case of Andy Archibald *vs.* The Texas and Pacific Railway Company, C. L. 419, the following proceedings were had, to wit:

Circuit Court of the United States for the Eastern District of Texas,
 Holding Session at Jefferson, Texas, September Term, A. D. 1895.

ANDY ARCHIBALD
vs. } No. 9064.
 THE TEXAS & PACIFIC RAILWAY COMPANY. }

THE STATE OF TEXAS, {
County of Harrison. }

District Court of said County, August Term, A. D. 1894.

Original Petition.

To the Hon. W. J. Graham, judge of the fourth judicial district of the State of Texas:

Your petitioner, Andy Archibald, a citizen of Shelby county, Texas, complaining of the Texas & Pacific Railway Company, a corporation created under an act of the United States Congress, approved on the — day of March, 1871, shows your honor that, on and before and ever since the first day of January, 1894, said company, which is defendant herein, was the owner of and engaged in operating a line of railway from El Paso, Texas, to Marshall, in Harrison

county, Texas, and from Marshall to New Orleans, in the State of Louisiana, and said company has a local agent in said county of Harrison, to wit: one W. N. Kennedy, who keeps his office at the city of Marshall, in said county of Harrison.

Petitioner shows that on or about the 20th day of January, 1894, he was in the employment of the said Texas & Pacific Railway Company, as a switchman in its yards at Shreveport, Louisiana, under the immediate orders of the yardmaster of said defendant, one — Howell, and was on that day performing his duties in the said yard, working under the orders of the yardmaster Howell; he shows that Howell had control of plaintiff and all switchmen in said yard, and they were by the rules of the service bound to obey orders of Howell; he shows that said company also keeps at Shreveport an officer called the car inspector, whose duty it is to inspect all cars that come into said yard, whether they come in over the defendant's railway or some other connecting road, as soon as the cars come into the yard, and to mark said cars as may be out of fix in any of their appliances, so that the trainmen or switchmen may know at the time he comes to handle the car whether it be safe or unsafe to handle, and for the purpose of advising the trainmen or switchmen of their condition, writes on both sides of the car with chalk the letters "B. O." which means that the car is in bad order, but on cars that are safe to handle he writes nothing at all, and by these marks the train and switch men know that a car is in or out of fix when they come to handle it.

Petitioner shows that there is at Shreveport a cotton-seed-oil mill and on this track cars to be loaded or unloaded at the oil mill are placed, and when ready, they are moved from the oil-mill track out upon the main yard track.

Petitioner shows that on January 20th, 1894, three cars were pulled out from the oil-mill track on to the main yard track, and plaintiff was ordered by Yardmaster Howell to uncouple two of these cars, both being oil-tank cars belonging to the American Cotton Seed Oil Company, and marked A. C. O. and numbers 351 and 383, and both provided with patent pin-pullers which is attached to the end of the cars having a lever by means of which the coupling pin can be drawn from or inserted in the drawhead without the switchmen being required to go in between the cars as he has to do with cars not provided with pin-pullers, which also makes it more difficult to pull out the pins when for any cause the pin-pullers are out of fix.

He shows that when he went to pull the pin he found that the pin-pullers on both cars were out of fix and could not be worked, and that in order to obey the orders of the yardmaster he was compelled to reach over the castings that formed a part of the pin-puller in order to reach and pull the pin with his hand after the usual fashion of doing that kind of work, the castings on each side of the drawhead making it somewhat more difficult to reach and pull the pin than in cars that were without such appliances; he shows that while he was pulling the pin, and while the cars were moving slowly, as is usual and customary in coupling cars, he was struck

on the leg by an iron rod from the rear car and which fastened the brake-beam to the break-staff and which had come loose from its fastenings; that this iron rod had on the end a chain about twelve inches long and was by the motion of the car pushed out in front of the car about three feet into the space between the two cars and about six inches from the ground; that as he was pulling the pin this rod struck his leg and was liable to trip him up, and in attempting to avoid being thrown down by the rod his arm was caught between the castings on the drawhead, crushing the bones at, above and below the elbow-joint of his right arm and injuring same to such extent that amputation of the right arm became necessary to save his life.

Petitioner shows that he did not know that the cars were out of condition until he went to uncouple them; when he discovered that the pin-pullers of both cars were out of order and that as he would have to uncouple them as if they had no pin-pullers by going between the cars and pulling the pin with his hands, and as he did not know of the iron rod being loosened from the brake-beam until it struck him on the leg, and until the loose chain and hook on the protruding end was about to trip him up; that he could not
6 obey the order of the yardmaster to uncouple the cars without doing just as he did, by pulling the pin with his hands, which is the usual and customary way of uncoupling cars, and practically without any danger, but he shows that the loose rod protruding from the rear car and striking against his feet greatly enhanced the danger, because it was liable to trip him or the loose chain and hook was liable to catch his foot and leg and throw him down between the cars, and in endeavoring to avoid the danger from the loose rod and chain his arm was caught as before charged and crushed. He shows that these cars had been in the yard for over a day and there was no mark of any kind on either to indicate that they were not in perfect order, and he did not know or believe that he was incurring more than ordinary danger of the service in obeying the order of his superior in uncoupling said cars, and while he did see the pin-pullers on both cars were out of fix and could not be worked, yet the danger of uncoupling without them was not greater than is usual in uncoupling cars not provided with pin-pullers; not one car in fifty in use are provided with pin-pullers, but are coupled and uncoupled by hand; that his injury was not caused by the pin-pullers being out of fix, but was caused by the loose rod striking against his feet, and to avoid being thrown down he was forced to turn his attention to the rod, and in endeavoring to avoid that danger his arm was caught between the castings on the drawhead and crushed as aforesaid; that he was not at fault, and was injured by the gross negligence of the defendant company in failing to inspect and repair its said cars, and in failing to fasten the rod to the brake, and in failing to notify the plaintiff that said rod was loose from its fastenings and liable to trip and throw him down while he was uncoupling said cars.

Petitioner shows that the bones of his arm above and below the elbow was crushed to pieces, and the joint was smashed until the

crushed bones protruded through the flesh and skin, and the arm had to be amputated above the elbow to save the life of petitioner, and that in consequence he has been deprived of the use of his right arm.

7 He shows that at the time of his injury he was twenty-three years of age, and was healthy, strong and active and able to do any amount of hard work; that he had been working as a brakeman and switchman on railroads for four or five years, and had adopted that business as a means of livelihood; that he was earning at the time he was hurt about seventy-five dollars per month, and his prospects were good for much larger wages as he grew older and had more experience in the business in which he was engaged, but that the loss of his right arm totally prevents him from following the business in which he was engaged and also from following any other business; that he is not an educated man and cannot earn anything except by manual labor.

He shows that he was confined to the hospital for more than thirty days after his arm was amputated, unable to do anything, and after he left the hospital his arm has pained him so as to unfit him from performing any kind of work; that he suffered great bodily pain at the time his arm was crushed, and during the period of his confinement at the hospital he suffered continually and since leaving the hospital his arm continues to give him great pain; that since his injury he has continually suffered and still suffers great bodily pain, agony and distress, and great mental agony arising from his maimed and crippled condition, and he is informed and believes and charges that he will continue to suffer as long as he may live, and that he will never again be able to earn a living by his labor; that he was twenty-three years old at the time he was hurt and a healthy and strong man, and will probably live for fifty years; that he was able to earn nine hundred dollars per year by his labor at and before his injury, but that in the present condition, after losing his right arm, he will never again be able to earn more than two hundred dollars per year, but that during the three months since he left the hospital, he has not been able to find employment or any work that he is able to do.

8 Petitioner shows that his injury was the result of the negligence of said company, in its failure to have said cars inspected, and in failing to have same repaired, or at least in failing to mark them as out of condition, so that persons working with them would know their condition; that plaintiff was not in fault in any way, and that his injury was caused by rod attached to the brake-beam being loose and protruding, and striking against his feet and legs, and in endeavoring to avoid which, his arm was caught and crushed; that in attempting to uncouple the cars in the manner he did, he was only performing his duty and obeying the orders of his superior, and in all of which he acted as a prudent and careful person would have acted under the same circumstances; that by reason of said injury his capacity to labor and earn money is almost if not entirely destroyed, and he is bound to suffer from his said injury through life, and to recover compensation for the in-

jury sustained and the physical and mental pain, agony and distress endured *as* to be endured, and for his loss of time, and for his diminished capacity to labor and earn money, this suit is brought, and for all of which he charges that he has been damaged in the sum of twenty-five thousand dollars actual damages, to recover which this suit is brought, and he prays that said defendant company be cited to appear at the next term of this court to answer this petition, and that citation for said defendant company be served on W. N. Kennedy, its local agent aforesaid, and on hearing he prays for a judgment against said defendant company for twenty-five thousand dollars actual damages, which includes all loss of time.

JAMES TURNER,
Attorney for Plaintiff.

File.

Original petition, filed May 12, 1894.

A. S. FIELD, *Clerk.*

9

ANDY ARCHIBALD
vs.
THE TEXAS & PACIFIC RAILWAY. }

1. Now comes the defendants and demur to plaintiff's petition and say the same shows no cause of action.

2. And for answer defendants deny each and every allegation in said petition and say they are not guilty of the wrongs charged against them.

3. The defendant- knew the condition of the cars and track where and when he was hurt and assumed the risk of being thereby injured.

F. H. PRENDERGAST,
Attorney for Defendants.

Answer filed August 14, 1894.

ALEX. S. FIELD, *Clerk.*

In the District Court of Harrison County, Tex., Fourth Judicial District.

ANDY ARCHIBALD
vs.
THE TEXAS & PACIFIC R'Y Co. }

Petition for Removal.

The petition of the Texas & Pacific Railway Company respectfully shows to the court:

1. That the Texas & Pacific Railway Company was, and is a corporation duly organized and existing under and by virtue of the laws of the United States, to wit: "An act to incorporate the Texas & Pacific Railway Company, and to aid in the construction of its

road, and for other purposes," approved March 3, 1871, an act amendatory thereof and supplemental thereto, including an act approved May 2, 1872, whereby among other things, the name, style and title of said The Texas & Pacific Railroad Company was changed to "The Texas & Pacific Railway Company."

10 2. That the above and entitled action was commenced in the above-named court on the 12th day of May, 1894, and citation issuing therein was served upon the defendant on the 12th day of May, 1894, which said citation is returnable on the second Monday in August, 1894, it being the 13th day of August, 1894, and this defendant is not, and will not be required, by the laws of the State of Texas, or the rule of this court, to answer or plead to this petition of the plaintiff before the 14th day of August, 1894.

3. That the matter in dispute in this case exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and this suit arises under the laws of the United States as hereinbefore and hereinafter more fully set forth; that this action was brought by the plaintiff, for \$25,000.00 for damages for personal injuries to plaintiff caused by the defendant's negligence on January 20, 1894, as appears from plaintiff's petition, which is referred to for a more particular statement of the cause of action. That this suit against this defendant is a suit arising under the laws of the United States, and more especially under the laws of the United States, constituting the charter of this defendant, and under which it was incorporated, that is to say, the said act of Congress of the United States, approved March 3, 1871, entitled An act to incorporate the Texas & Pacific Railroad Company, and to aid in the construction of its road and for other purposes," and act amendatory thereof and supplemental thereto, approved respectively on March 2, 1872, March 3, 1873, and June 22, 1874.

4. The above-entitled action is a civil suit arising under the laws of the United States of which the circuit court of the United States for the eastern district of Texas is given original jurisdiction by act of Congress, approved March 3, 1887, to wit: an act entitled "An act of Congress, approved March 3, 1875, entitled An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," and the acts of Congress approved August

11 other purposes," and the acts of Congress approved August 13, 1888, entitled An act to correct the enrollment of an act approved March 3, 1887, entitled "An act to amend section- 1, 2, 3 and 10 of an act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes, approved March 3, 1875."

Your petitioner herewith presents and filed a good and sufficient bond conditioned that it will enter and file in the circuit court of the United States for the eastern district of Texas, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said circuit court if said court shall hold that said suit is wrongfully or improperly removed thereto, and to enter special bail in said suit, if special bail was originally requisite therein. Your petitioner therefore prays the said court to

accept said petition and bond, and to remove this cause to the circuit court of the United States for the eastern district of Texas, and for such other relief in the premises as may be just and equitable.

THE TEXAS & PACIFIC RAIL-
WAY COMPANY.

F. H. PRENDERGAST, *Attorney.*

Petition for removal, filed the 14th day of August, 1894.

ALEX. S. FIELD,
Clerk Dist. Court, Harrison Co., Texas.

In the District Court of Harrison County, Texas, Fourth Judicial District.

ANDY ARCHIBALD

vs.

THE TEXAS & PACIFIC RAILWAY COMPANY. }

Know all men by these presents: That the Texas & Pacific Rail-
way Company as principal, and ——— and ——— as
12 sureties, are held and firmly bound unto Andy Archibald in
the penal sum of five hundred dollars, for the payment
whereof, well and truly to be made, unto the said Andy Archibald,
his heirs and assigns, we jointly and severally bind ourselves, our
successors, representatives, heirs and assigns, firmly by these pres-
ents, yet upon these conditions, that—

Whereas, the said Texas & Pacific Railway Company has filed
its petition in the district court of Harrison county, for the removal
of a certain cause pending, wherein Andy Archibald is plaintiff and
The Texas & Pacific Railway Company is defendant, the said cause
being numbered upon the docket of said court as No. 9064, to the
circuit court of the United States for the eastern district of Texas.
Now, therefore, if the said Texas & Pacific Railway Company shall
enter in said circuit court of the United States for the eastern
district of Texas, a copy of the record in said suit on the first day
of the next session thereof, and shall pay all costs which may be
awarded by said circuit court of the United States, if said court
shall hold that said suit was wrongfully or improperly removed
thereto, and shall there appear and enter special bail in said suit,
if the same was originally requisite in said cause, then this obliga-
tion shall be void; otherwise of full force and effect.

Witness our hands and seal, this 13th day of August, 1894.

TEXAS & PACIFIC RAILWAY COMPANY,

By F. H. PRENDERGAST, *Agent.*

I. HOCKWALD.

E. KAHN.

Bond for removal. Filed 14th day of August, A. D. 1894. Alex.
S. Field, clerk district court, Harrison Co.

ANDY ARCHIBALD
 VS.
 THE TEXAS & PACIFIC RAILWAY COMPANY. }

AUGUST 20TH, 1894.

This cause coming on this day to be heard, upon the petition of the Texas & Pacific Railway Company, to remove same to the circuit court of the United States for the eastern district of Texas, said petition being heard by the court, and — appearing to the court that a good and sufficient bond has been filed, and that said petition shows proper grounds for removal, the prayer of the said Texas & Pacific Railway Company is granted and its bond approved, and this cause ordered removed to the circuit court of the United States for the eastern district of Texas, and the clerk of this court will make out a transcript of the record in this cause, to be filed in the United States court for the said district of Texas.

ANDY ARCHIBALD
 VS.
 TEXAS & PACIFIC R'Y CO. } No. 419.

WEDNESDAY, Sept. 25th, 1895.

On this day came into the court the plaintiff, Andy Archibald, by his attorneys, and also came the defendant, The Texas & Pacific R'y Co., by its attorney and the aforesaid parties announced themselves ready for trial, and then came into the court a jury of good and lawful men, to wit: E. Davis, foreman, and eleven others, who were duly and legally empaneled, tried and drawn and sworn according to law, and after hearing the evidence offered by the parties, and the argument of counsel, and after receiving the charge of the court, the jury retired from the court to consider of their verdict, and after a short absence the jury returned and made known to the court that they had agreed upon their verdict and the same was then handed to the clerk and read, being as follows:

14 "We, the jury, find for the plaintiff, Andy Archibald, *versus*
 The Texas & Pacific R'y Co., in the sum of five thousand
 (\$5,000.00) dollars.

E. DAVIS, *Foreman.*"

It is therefore ordered, adjudged and considered by the court that the plaintiff, Andy Archibald, do have and recover from the defendant, The Texas & Pacific R'y Co., the sum of five thousand dollars, the finding of the jury aforesaid, together with all costs of this suit, and that the above sum shall bear six per centum per annum interest from this date until the same is paid, for all of which let execution issue.

It is further ordered that execution may issue against each party for the cost by them respectively incurred.

In U. S. Circuit Court, Eastern Dist. of Texas, at Jefferson.

ANDY ARCHIBALD
vs.
TEXAS & PACIFIC R'Y Co. } No. 419.

Be it remembered, that on the trial of the above cause in said court on September 25, 1895, the following facts were proved and evidence introduced :

The suit was filed by Andy Archibald against the Texas & Pacific R'y Co., in the district court of Harrison county, Texas, and was at the first term of the court removed into this court by the defendant, on the ground that defendant was a Federal corporation, and no objection taken to the time nor the manner of removal nor of defendant's right to remove.

ANDY ARCHIBALD testified: I am the plaintiff. On January 20, 1894, I was employed by the defendant company as switchman in the yard at Shreveport, La., and had been so employed about three months. I was under the orders of the yardmaster, W. G. Hamell; my duties were to couple and uncouple cars, to assist in making up trains leaving the yard, and to assist in receiving cars coming into the yard and place them on proper tracks, and do such other work around the yard, as the yardmaster requires.

15 There was a car inspector at Shreveport yard, named C. E. Jones; his duty was to inspect all cars coming into the yard; if their condition was bad, it was his duty to repair them if they could be repaired there; if he could not repair them there, it was his duty to mark the car in bad order, by chalking "B. O." on the sides of the car, which means the car is in bad order; the object of doing this is to warn barkemen and switchmen of the condition of the car; I saw the two cars numbered 351 and 383 on January 20th, 1894, in the Shreveport yard; they belonged to the American Cotton Oil Company; they did not come into the yard that day, but came a day or two previous to that day. The yardmaster, Mr. Hamell, ordered me to uncouple one of these cars from the other. There were no marks on the cars to indicate that they were in bad order and condition. I found them in bad order; I found the pin-puller on both of them out of fix so that they could not be marked; that is what I saw when I first went up to them; I afterwards found that an iron rod that runs under the car and fastens the brake on one of the cars was loose, and as the cars were moving slowly this rod from the rear car pushed one from under the car about two or three feet into the space where I had to stand while uncoupling the cars. On the end of this rod was a hook and chain about three feet long. When I saw the pin-puller would not work I had to go in between the cars to pull the pin out of the drawhead in the usual way with my hand. I had reached over the casting that formed part of the pin-puller and had hold of the pin to pull it out of the drawhead; just at this time something struck me on the leg and I felt my foot and leg being tangled up in the hook or chain on the end of the rod; I looked down to see what was the matter and to

protect myself from being thrown down by the rod, and while I was trying to avoid the injury from the rod my arm was caught between the castings of the drawhead and crushed it above the
16 elbow; it was my right arm. When the rod struck my leg it came very near knocking me down and would have done so if I had not had hold of the car in front. The rod was pushed out from under the rear car into the space between the two cars in which I had to stand to make my coupling about three feet. I did not at the time know exactly what was the matter, but I was afraid it would break my leg or throw me down between the cars and I tried to protect myself from the danger, and while so engaged my right arm was caught and crushed, and had to be amputated above the elbow. The injury caused me great pain. The pin-puller did not cause me to get hurt; it was caused by the iron rod and chain. This iron rod runs under the car and is about twenty-five feet long and is fastened to the brake-beam. This rod is about one inch in diameter, was under the rear car and was loose from the front brake-beam and the action of the car caused it to be thrust out from under the car two or three feet. The end of the rod was bent in the form of a hook and there was attached to it a piece of chain over a foot long. This rod was pushed out between the cars and struck my leg, and in protecting myself from that danger my arm was caught and crushed. I did not see the rod when I went in to uncouple and did not know it was loose until I was hurt. I was twenty-four years old when hurt and was earning sixty dollars per month. I can't get anything to do now. I have tried to get work. My right hand had hold of the pin when the rod struck me. George E. Hadley saw me get hurt. He was standing some distance away on the side of the track. No person warned me of the cars being out of order. I was hurt on the main track. The cars had been taken out of the oil-mill track a few moments before. They had been placed on the oil-mill track two or three days before that to be filled with oil.

L. K. VANCE testified for plaintiff as follows:

17 I remember when Archibald was hurt. I was then superintendent of yards at the Union Oil Co. yards in Shreveport and was about twenty steps from Archibald when he was hurt but did not see it. The cars had been on oil-mill switch two or three days; I did not make a minute examination of the cars; the oil-mill track connects with Texas & Pacific R'y track; I did see before Archibald was hurt a rod sticking out from under one end of the cars; it was while weighing these cars and adjusting on the scales that I had to step over this rod in order to get in and out from between the cars on the oil-mill switch on the day Archibald was hurt this rod extended out about two or three feet between the cars; I had to step over it to get to the couplings.

Plaintiff rested.

W. G. HOWELL, witness for defendant, testified as follows:
I remember the occasion when Mr. Archibald was hurt in Shreve-

port; my occupation at that time was yardmaster in charge of the Shreveport yard; at the time Archibald was hurt I was within one car-length of him, about thirty-four feet; I was making a coupling at the time; Archibald was hurt between two oil-tank cars; at the time he was hurt I was coupling a box car on the main line; there was only one car between the engine and where Archibald was hurt, and there were two cars between where I was standing and the engine; I was coupling on to a box car; the two cars between which Archibald was hurt belonged to the Cotton Belt railroad, that is, we got them from the Cotton Belt; they were not Texas & Pacific R'y cars, but were American Oil Co. cars; they came from the Cotton Belt to the yard at Shreveport; they were brought over there for the purpose of loading cotton-seed oil into them from the Union oil mill; we got those cars from the Cotton Belt and put them in the oil-mill yard in the morning about 8 or 9 o'clock, I guess; after the oil was loaded into them they were delivered to the Cotton

18 Belt; from the place where these cars were delivered to the Cotton Belt road to the place where Archibald was hurt it was about 200 yards, I guess, and the cars were received from the Cotton Belt at the same place at which they were delivered to it; I have not examined the car, or the part of it that Archibald speaks of as having caused his injury. Mr. Archibald was working under me at the time he was hurt; it was on the main track where Archibald got hurt. The purpose for which the cars were being moved was that the oil mill had one of the cars loaded and wanted us to take that out and put the empty one at the oil mill, and I told Archibald to go in there and cut the empty off and set it back; and I went in to make the coupling on the loaded car, and just as soon as I made the coupling I heard him halloo, and I went up there and asked him what was the matter, and he said he was mashed; the loaded car was taken off and the empty was put back in the yard to be loaded with oil; I don't remember when that car was taken out, but I think it was next day some time; the distance from the place where the oil was loaded on the car to where Archibald got hurt is about forty or fifty yards, I guess; it is just a side track that runs out to the oil mill there from the main line.

Cross-examined he testified:

There were two oil cars in that train; we did not have hold of the box car, the box car was standing on the main line; I was making the coupling to the cars on the main line that went to the Cotton Belt; I coupled on to the box car; I was behind Archibald at the time he was hurt; I was one car from him; the two oil cars were being pushed down on this box car and I was coupling to the box car; Archibald was between the two oil cars. This accident happened about 2.45 in the evening, between 2 and 3 o'clock; I think we received that car from the Cotton Belt; I have known a car to be brought to that oil mill and loaded and taken out

19 in less time than I have indicated; that car came into my yard; we had no car inspector there; there was no car inspector in the Shreveport yard; we had one at Shreveport Junction, but none down in the yards.

On redirect examination he testified :

Archibald was uncoupling two cars, and I was coupling two cars together ; the reason that the two cars were moving when he was uncoupling them was that just as I went to make the coupling Andy Archibald gave the signal to give him the slack to move the pin, and just as soon as he did that I stepped up to make the coupling, and as soon as I made the coupling I heard him halloo and I went there and asked him how it happened, and he said he got his arm between the drawheads.

Examined by the court he testified :

Archibald was cutting apart the two oil tanks at the time he was hurt, and I was coupling the loaded oil tank onto the box car ; the tank was going to the Cotton Belt and I took the load out and set the empty back to the oil mill.

On recross-examination he testified :

The freight train- on the Cotton Belt now get out in the morning about 7 o'clock, or probably earlier ; they leave about 7 ; I don't know what time they were due when this thing occurred.

C. E. JONES, witness for defendant, testified as follows :

I remember the occasion of Mr. Archibald getting hurt in Shreveport ; my occupation at that time was car inspector at Shreveport Junction ; my duty is to inspect all cars coming in over our lines into Shreveport Junction and to inspect all cars coming from connecting lines going out over our lines, but switch-cars I never inspect, that is, cars from the Cotton Belt transferred to some point in our yard to be delivered back to the Cotton Belt either loaded or empty ; it is the duty of the Cotton Belt inspector to inspect those cars and mark them ; I was not present when Mr. Archibald was hurt ; I inspected that car afterwards ; I found that as to drawheads, etc., everything was all right, but the brake was broken on No. 351 oil tank, that is the bottom brake-rod was missing, that is the rod that connects the two brake-beams together ; the brake on that car would not work ; those cars were delivered back to the Cotton Belt ; I inspected that car because I had instructions to do so from Mr. Pearsell, our superintendent ; Mr. Harris had wired Mr. Pearsell, I believe, that there was an accident, and it is our duty then to inspect cars to see whether we were to blame or some one else ; Mr. Harris is agent there at Shreveport.

Cross-examined he testified :

The Cotton Belt yard and the T. & P. yard in Shreveport are both right there together ; I do not mean to say that the T. & P. freight yard and the Cotton Belt freight yard use the same tracks ; each uses its own tracks, but I am not posted about that at all ; I believe the Cotton Belt yard extends along the river front ; the T. & P. freight-house is along the bayou, I think, and that is a part of the yard ; the Cotton Belt yard is beyond this oil mill ; the only connection is the connection of the tracks.

J. G. HARRIS, witness for defendant, testified as follows :

At the time Mr. Archibald was hurt in the Shreveport yard, I was the T. & P. agent there ; I remember that occasion ; at the time I

was sitting in my office, about thirty or forty yards from where Archibald was hurt; I heard him halloo and I ran out and got to him about as quick as Howell did; I did not make an examination to see what occasioned the injury to him; I am not conversant with the operations of switchman; I just saw his arm was mashed; I immediately reported the matter by wire, and made a special report as we do in all matters of accidents; I reported it to Mr. Pearsell, division superintendent; he wired me to have Mr. Jones, car inspector, to make an examination of the cars that we were handling at the time Archibald was hurt; I did that; those cars were
 21 put in the yard that morning from the Cotton Belt connecting tracks; they were put there to be loaded with oil by the Union Oil Co., and they were to be delivered back to the Cotton Belt railroad; that was done; I think the oil tank, No. 351, was delivered soon after the accident occurred, which was about 2.45; it is possible that we did not get that car delivered to the Cotton Belt that afternoon until maybe half past 3 o'clock on account of Archibald getting hurt; the other car was delivered the next day.

Cross-examined he testified:

When I was agent there I kept a record in my office of the cars that came in; we make a record of all cars received and delivered to connecting lines, and of all cars that are received or forwarded by our lines, with the dates; I have not brought that record here; I was not asked to bring it; I knew that Archibald was hurt and that he had a suit against the T. & P. R'y; we have handled in the T. & P. yards at Shreveport as high as 140 cars per day, in and out, and sometimes 30; I should take it as an average the year round that we handled 35 or 40 cars a day; at the season of the year when this accident occurred we handled about 40 a day; we handled a few more in January than in the summer, but not many more.

On redirect examination he testified:

I am not the agent at Shreveport now; I left there on September 12th.

On recross-examination he testified:

The yardmaster keeps that car record in a book, and draws it off and hands it to a clerk for record in the office.

Defendant rested.

GEO. E. HADLEY, witness for plaintiff in rebuttal, testified:

In January, 1894, I resided in Shreveport, Louisiana; I know Andy Archibald; I was about 35 or 40 yards from him at
 22 the time he was injured; I was engaged at the time in a private matter that I was attending to, and had occasion to be there for several days; I cannot say that I noticed that particular oil tank that injured him, but I saw some oil-tank cars on the oil-mill switch the day before this accident; I know there were oil-tank cars on the switch the day before; I did not go to Archibald as soon he was hurt; I saw him when he was hurt; at the time of the accident I was sitting by a window in the New Orleans Brewing Association's office, and was reading, I believe, at the time, and I

heard a scream that I thought was from a woman and I looked up, and looked right out of the window, I had a full view of whoever it was; I did not know who it was, but I saw some one stumble out from between the cars, and immediately try to hold an arm in that position (indicating); I went to the door and seeing some one coming around there I went to telephone—seeing it was Andy—to Mr. —, a man that I knew was his friend, that Andy was hurt bad and to come down there, which he did; I did not notice what he tumbled over; I did not notice it at the time; he did stumble as he came out; he did not stumble over the rail; he did not touch the rail; I could only see his feet; I could not see his body.

Cross-examined he said:

The corner of the car prevented me from seeing the rest of his body; he seemed to be in a leaning position and seemed to stagger out from between the cars; I did not go to the place at all and did not see what he stumbled over; oil cars are flat cars with an iron cylinder on them; it just looked like a boiler laying up on a flat car; I say that I saw oil-tank cars on this switch the day before the accident; what attracted my attention to those cars was that Mr. Tommy Jacobs and Mr. Vance and myself went down there, and I was being shown how the large tanks were filled with oil, etc., and at the same time I went through the oil mill, as I had not seen it before; I remember that it was the day before this accident that I

23 saw the cars there; I have no idea of the number of oil tanks they fill there a month; I have no interest in this case whatever; I have not been subpoenaed here as a witness; I was asked to come here by the attorney and I came in order to save the trouble of being brought.

Plaintiff closed.

J. G. HARRIS, recalled by defendant in rebuttal, testified:

I think two or three cars a day would be a good average for the number of cars shipped out of that track there, but that altogether depends upon the furnishing of these cars by the American Cotton Oil Company; very frequently they will run in five or six or eight cars, empty, at once, and we will put them in and out just as fast as they can be loaded; the number is irregular; I should judge that during the month of January we switched for the Cotton Belt railroad between twenty and twenty-three cars of oil from the oil mill, or in that neighborhood; we might have moved one or two cars for V., S. & P. during that time, but I think that is doubtful.

Cross-examined, he said:

We moved none for our own road; other roads take that oil out besides the Cotton Belt, but the product of that mill is divided up among the transportation lines according to the number of tons of seed brought in; there were not necessarily more tons brought in by that road than the others, but the movement of oil was towards St. Louis and that was about the only product of the mill that the Cotton Belt could handle, not being a Gulf line; the movement of cotton-seed products towards the Gulf and New Orleans was given to the T. & P. R'y and to the V., S. & P., and some to the H. & S.;

the movement of the meal by various lines is governed by the market for which it is intended, and during January the oil was going to St. Louis and Chicago; when empty oil tanks came in there to be loaded they were left on the Cotton Belt connecting track, and sometimes in our yard; we seldom put more than three at a time in the oil-mill yard, as their piping is only arranged to handle three cars at a time, that is, on the oil-mill track proper, but since that time they have made improvements and can handle more.

The above is all the evidence introduced on the trial of the said cause.

Charge of the Court.

GENTLEMEN: This is a suit brought by Andy Archibald against the Texas & Pacific Railway Company, in which he alleges in substance that about the 16th of January, 1894, while a brakeman in the yard of the Texas & Pacific R'y Co. at Shreveport, Louisiana, while handling a car under the direction of the foreman of defendant that he was injured, by which he lost his right arm; that his injuries were the result of defective appliances furnished by the defendant, and that he was without fault upon his part; he sued for \$25,000, alleging that he was about 23 years old at the time of the accident and was earning \$75.00 per month. The defendant answers by a general denial and by a plea of contributory negligence.

It is the duty of the railway company to furnish its employés with machinery reasonably safe with which to perform their labor, and it is the duty of the company further to make such inspection and repairs from time to time as prudence and experience have shown to be necessary to keep the machinery in proper condition, and if any party is injured by such defective appliances, and without negligence on his part, he is entitled to recover. Of course, if the defects are open and patent, or if known to the employé, or by the exercise of ordinary care could be known, in that case he would not be entitled to recover, on the ground that he was guilty of contributory negligence himself. If you believe in this case that the plaintiff was injured as charged, and that the injury was the

25 result of defective cars furnished by the defendant company, and that in consequence of such defect he was injured, and that he did not contribute by any act on his part to such injury, you will find for the plaintiff in such sum as you shall find, not to exceed the amount claimed in the petition. And in arriving at a verdict, if you find for the plaintiff you will take in consideration the amount he was earning, the probable length of his life, and his diminishing ability to labor and earn money, and the physical and mental suffering he has undergone and will continue to undergo. All of those elements are simply in the nature of compensation to give the party such sum as would compensate him, in dollars and cents, for the injuries he has sustained.

If you believe from the evidence in this case that the plaintiff was injured as charged, but that the injury was contributed to by his

own act, that is, if you believe that the accident was caused by a broken rod and that that was open and patent to him, or that he saw it, or that by the exercise of ordinary care he might have seen it, in that event he cannot recover, as he would be guilty of contributory negligence, and you will find for the defendant.

You are also instructed that if you believe from the evidence in this case that it was the custom of the defendant company at Shreveport, Louisiana, not to inspect or repair cars when they were furnished by other roads simply to be taken into the oil-mill yard, and not with the intention of being placed in trains by the defendant, and you further believe that the plaintiff knew that such was the custom, and that he thereafter voluntarily continued in the employment of the defendant, you are instructed that he would be chargeable with such negligence on the part of the company and would not recover.

You are the judges of the credibility of witnesses and the weight to be given to their testimony. If you find for the plaintiff the form of your verdict will be: "We, the jury, find for the plaintiff, Andy Archibald, against the Texas & Pacific Railway Company, in the sum of — dollars actual damages." If you find for the defendant the form of your verdict will be: "We, the jury, find for the defendant."

At the defendant's request the court charged the jury as follows: If the defect in the car (if any) that caused the injury to plaintiff was as open to the observation of the plaintiff as it was to the observation of the defendants, then it was as much negligence in the plaintiff not to have discovered it as it was in the defendants not to have discovered it, and in such a case the plaintiff cannot recover.

Given.

D. E. BRYANT, *Judge*.

The defendant requested the court to charge the jury as follows:

If you believe that the defendant company had car inspectors at Shreveport, but that it was not their duty under their employment to inspect cars that came from other roads onto the defendant's track merely for the purpose of being loaded and returned; and if the cars that the plaintiff was uncoupling when he was injured had been brought from the Cotton Belt road to be loaded with oil and returned to said road; and if the plaintiff knew [or by the exercise of ordinary care could have known] that it was the custom of defendant company not to inspect cars that were brought in as they were, to be returned; then the plaintiff would be held to assume the risk of being injured by reason of defects in said cars, and in such a case he cannot recover.

Given, with words between brackets erased.

D. E. BRYANT, *Judge*.

And the defendant then and there excepted to the qualification and erasure and excepted to the court not giving the charge as requested.

The defendant requested the court to charge the jury as follows:

27 It appears in this case that plaintiff was injured while uncoupling two cars that did not belong to the defendant company, but had been brought from the "Cotton Belt road" to be loaded and returned to that road; now if you believe that it was the custom of defendant company not to inspect or repair cars when thus brought over to be loaded and returned, and the plaintiff knew this custom [or could have known of it by the exercise of ordinary care], then he assumed the risk of being injured by any defect in such cars and cannot recover.

D. E. BRYANT, *Judge*.

The court gave the charge with the words between brackets erased; the defendant then and there excepted to the erasure and qualification and excepted to the court not giving the charge as requested without erasure.

The defendant requested the court to charge the jury as follows:

The duty to inspect cars coming from other roads applies only when the car is to be sent out on the receiving road and does not apply when cars are switched from one road to be loaded and returned to the road from which they were received.

Refused.

D. E. BRYANT, *Judge*.

Which charge was refused by the court, and to this refusal the defendant then and there excepted.

The defendant requested the court to charge the jury as follows:

It is the duty of a railroad company to use ordinary care in keeping the cars which their employes are called on to handle in repair so as not to expose their employes to unnecessary danger, and this duty exists to use ordinary care to inspect cars that came from other roads to be hauled over their own road; what is ordinary care is always measured by the facts and circumstances of the particular case; and ordinary care means more care in one case than in another; the amount of care and caution to inspect cars coming

28 from other roads to be merely loaded and returned to the other road is not as great as when the car is to be sent out on the road of defendant; because in the first case the car is to be handled only by switchmen who have a much better opportunity to observe any defect and protect themselves than the trainmen do when a car is placed in a train and sent out on the road. Now if the defendant used ordinary care to discover and repair defects in the car in question, under the circumstances of this case, then defendant is not liable.

Refused.

D. E. BRYANT, *Judge*.

Which charge was by the court refused and the defendant then and there excepted to said refusal.

The defendant requested the court to charge the jury as follows:

That in the absence of any evidence on the point, it would be presumed from the circumstances of this case that the plaintiff knew the custom of the defendant not to inspect cars in the Shreveport

yard that were switched from other roads to be loaded and returned to the roads from which they came.

The court refused to give said charge and the defendant then and there excepted. All exceptions to charges given and refused were made in open court and before the jury retired.

The jury returned a verdict for plaintiff for \$5,000, and judgment was rendered thereon, and defendant's motion for a new trial was overruled, and they now present this as their bill of exceptions, and pray the same be allowed.

Allowed in open court October 10, 1895.

D. E. BRYANT, *Judge*.

Endorsed: U. S. C. C. No. 419. Andy Archibald *vs.* Texas & Pacific Railway Company. Bill of exceptions. Filed in open court October 10, 1895. C. Dart, clerk, by W. E. Singleton, deputy.

29 In the United States Circuit Court for Eastern District of Texas, at Jefferson.

ANDY ARCHIBALD
vs.
TEXAS & PACIFIC RY Co. } No. 419.

Now comes the Texas & Pacific R'y Co. and shows to this court that the above cause was tried on September 25, 1895, and judgment rendered therein for the plaintiff for \$5,000.00, and in the proceedings and in the rendition of said judgment manifest errors have happened as follows:

First. The defendant requested the court to charge the jury as follows:

"If you believe that the defendant company had car inspectors at Shreveport, but that it was not their duty under their employment to inspect cars that came from other roads on to defendant tracks merely for the purpose of being loaded and returned. And if the cars that plaintiff was uncoupling when he was injured had been brought from the 'Cotton Belt' road to be loaded with oil and returned to said road. And if the plaintiff knew [or by the exercise of ordinary care could have known] that it was the custom of the defendant company not to inspect cars that were brought in as they were to be returned, then the plaintiff would be held to assume the risk of being injured by reason of defects in said cars, and in such case he cannot recover."

The court gave said charge after erasing the words between brackets as shown above. The court erred in making said erasure and not giving said charge as requested without any erasure.

Second. The defendant requested the court to charge the jury as follows:

"It appears in this case that plaintiff was injured while uncoupling two cars that did not belong to defendant company, but had been brought from the Cotton Belt road to be loaded and returned to that road. Now, if you believe it was the custom of defendant

30 company not to inspect or repair cars when thus brought over to be loaded and returned, and the plaintiff knew this custom [or could have known of it by the exercise of ordinary care] then he assumed the risk of being injured by any defect in said cars and cannot recover." The court gave this charge after erasing the words between brackets as shown above. The court erred in making this erasure and in not giving said charge as requested without any erasure.

Third. The court erred in not giving the following charge as requested by the defendant :

"The duty to inspect cars coming from other roads applies only when the car is to be sent out on the receiving road, and does not apply when cars are switched from one road to be loaded and returned to the road from which they were received."

Fourth. The court erred in refusing the following charge requested by the defendant :

"It is the duty of a railroad company to use ordinary care in keeping the cars which their employees are called on to handle in repair so as not to expose their employees to unnecessary danger, and this duty exists to use ordinary care to inspect cars that come from other roads to be hauled over their own road. What is ordinary care is always measured by the fact and circumstances of the particular case, and ordinary care means more care in one case than in another. The amount of care and caution to inspect cars coming from other roads to be merely loaded and returned to the other road is not so great as when the car is to be sent out of the road of defendant because in the first place the car is to be handled only by switchmen who have a much better opportunity to observe any defect and protect themselves than the trainmen do when a car is placed in a train and sent out on the road. Now, if the defendant used ordinary care to discover and repair defects in the car in question under the circumstances in this case, then defendant is not liable."

Fifth. The court erred in refusing the following charge requested by the defendant :

31 "That in the absence of any evidence on the point it would be presumed from the circumstances of this case that the plaintiff knew the custom of the defendant, not to inspect cars in the Shreveport yard that were switched from other roads, to be loaded and returned to the road from which they came."

The Texas & Pacific Railway Company prays that it be allowed a writ of error to the circuit court of appeals to review said judgment on the error above assigned, and that said judgment be reversed and a new trial granted, and that amount of supersedeas be fixed.

F. H. PRENDERGAST,
Attorney for Texas & Pacific R'y Co.

October 6, 1895.—Writ of error allowed and supersedeas bond fixed at \$8,000.00.

Filed October 30, 1895.

C. DART, *Clerk*,
By W. E. SINGLETON, *Deputy*.

UNITED STATES OF AMERICA, 88 :

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Texas, at Jefferson, Greeting :

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Andy Archibald, plaintiff, and The Texas & Pacific R'y Co., defendant, in the judgment rendered in said court at Jefferson on September 25, A. D. 1895, in favor of Andy Archibald and against The Texas & Pacific R'y Co., in cause No. 419, for five thousand dollars, a manifest error hath happened to the great damage of the said The Texas & Pacific R'y Co. as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in

32 this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the fifth circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within 30 days from the date hereof, in the said United States circuit court of appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 30th day of October, in the year of our Lord one thousand eight hundred and ninety-five.

C. DART,

Clerk of the U. S. Circuit Court, E. D. T., Jeff.

By W. E. SINGLETON, *Deputy.*

Oct. 26, 1895.

Allowed by—

D. E. BRYANT,

U. S. Dist. Judge, Eastern Dist. of Texas.

I hereby certify that a copy of the original writ of error herein is filed in this office by the plaintiff in error this day.

Given under my hand and the seal of the U. S. circuit court for said district this the 2d day of November, A. D. 1895.

C. DART, *Clerk,*

By W. E. SINGLETON, *Deputy.*

(Endorsement:) No. 419. Law docket. United States circuit court, eastern district of Texas, at Jefferson. Andy Archibald vs. Texas & Pacific R'y Co. Writ of error. Filed October 30, 1895. C. Dart, clerk, by W. E. Singleton, deputy.

33

Know all men by these presents that we, The Texas & Pacific Railway Company, as principal, are held and firmly

bound unto Andy Archibald in the full and just sum of eight thousand dollars to be paid the said Andy Archibald, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of October, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a term of the United States circuit court for the eastern district of Texas, at Jefferson, in a suit depending in said court between Andy Archibald, plaintiff, and The Texas & Pacific Railway Company, defendant, a judgment was rendered against the said Texas & Pacific Railway Company for five thousand dollars, on September 25th, A. D. 1895, and the said Texas & Pacific Railway Company, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Andy Archibald, citing and admonishing him to be and appear before the United States circuit court of appeals for the fifth circuit, to be holden at New Orleans, La., within thirty days from the date thereof:

Now the condition of the above obligation is such that if the said The Texas & Pacific Railway Company shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TEXAS & PACIFIC RAIL- [SEAL.]
WAY CO.,

By F. H. PRENDERGAST, [SEAL.]

Agent and Att'y.

W. M. ROBERTSON, [SEAL.]

E. J. FRY. [SEAL.]

Approved by—

D. E. BRYANT,

U. S. District Judge, Eastern District of Texas.

October 26, 1895.

34 I agree the within bond is sufficient as to sureties and amount.

JAS. TURNER,

Attorney for Andy Archibald.

UNITED STATES OF AMERICA, ss :

The President of the United States to Andy Archibald and his attorney of record, James Turner, Greeting :

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the fifth circuit, at New Orleans, Louisiana, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, at Jefferson, wherein The Texas & Pacific Railway Company is plaintiff in error and you

are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David E. Bryant, judge of the circuit court of the United States, this 26th day of October, in the year of our Lord one thousand eight hundred and ninety-five.

D. E. BRYANT,

U. S. Dist. Judge, Eastern Dist. of Texas.

Oct. 29, 1895.—I accept service on the within citation.

JAMES TURNER,

Attorney for Andy Archibald.

(Endorsement :) No. 419. Law docket. United States circuit court, eastern district of Texas, at Jefferson. Andy Archibald vs. Texas & Pacific R'y Co. Citation in error. Issued Oct. 26th, 1895. Returned and filed 30th day of October, 1895. C. Dart, clerk, by W. E. Singleton, deputy.

35

ANDY ARCHIBALD

vs.

TEXAS & PACIFIC RAILWAY COMPANY.

} C. L., No. 419.

1894.			
Sept. 24.	To fil. enter clf. petition.....	40	
	" Continuance.....	30	
1895.			
Jan'y 29.	" Fil. 10c., opening, 15c., clf. to P. M. 15c.....	40	
Sept. 14.	" Fil. motion.....	10	
	" Making copy 15c., C. & S. 50c.....	65	
	" Iss'g precept to serve motion.....	1.00	
	" Fil. and enter return precept.....	40	
Sept. 25.	" Fil. 10c., clf. to P. M. 15c., open. dep. 15c.....	40	
	" Swearing 6 witnesses.....	60	
	" Fil. verdict.....	10	
	" Fil. judgment.....	10	
	" Enter judgment.....	60	
Sept. 26.	" Fil. motion for new trial.....	10	
	" Tax cost and making dupl. C. B. C. & S.....	75	
	" Final record 48 fols.....	7.20	
Oct. 2.	" Fil. 2 sets interrogatories.....	20	
	" Making copy 2 sets interrogatories.....	1.50	
	" Certificate and seal.....	1.00	
	" Issuing 2 commissions.....	2.60	
Oct. 4.	" Fil. interrogatories.....	10	
	" Making copy C. & S.....	80	
	" Issuing commission.....	1.30	
	" Enter order ov'ral'g motion new trial.....	15	
	" Fil. 30c., open'g 45c., 3 sets depositions.....	75	
	" Certificate to P. M. 45c., depo. 3 sets.....	45	
To amount carried for'd.....			\$21.95

36	To amount brought for'd.....	\$21.95
1895.		
Oct. 10.	" Fil. bill exceptions.....	.10
	" Fil. 6 special charges.....	.60
Oct. 30.	" Fil. assignment of error.....	.10
	" Iss'g writ of error.....	1.30
	" Certificate and seal.....	.35
	" Fil. bond.....	.10
	" Iss'g citation.....	1.00
	" Making certified copy writ of error.....	1.00
	" Fil. copy writ of error.....	.10
	" Fil. copy citation.....	.10
	" Docket and indexes.....	1.00
Nov. 2.	" Making transcript, 161 fols.....	16.10
	" Certificate and seal.....	.50
	To total.....	\$44.30

No. —.

In the Circuit Court of the United States for the Eastern District of Texas, at Jefferson.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, at Jefferson, do hereby certify that the foregoing and attached pages of manuscript numbered in the margin of said pages (from one (1) to forty-three (43) both inclusive), contain a full, true and correct copy and transcript of the original petition, demurrer, bond of removal, order of removal from State court; judgment of circuit court, motion for new trial, order overruling motion for new trial, bill of exceptions, charge of the court, assignment of errors, writ of error, writ of error bond, citation, cost bill, certificate, in cause C. L. No. 419, Andy Archibald vs. The Texas & Pacific Railway Company, all of which appears from the records of said court, now in office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the circuit court of the United States of America for the eastern district of Texas, at Jefferson, at my office in said city of Jefferson, this 2nd day of November, A. D. 1895.

C. DART,

Clerk of U. S. Circuit Court, Eastern District of Texas, Jefferson,

By W. E. SINGLETON, *Deputy.*

(Endorsement :) C. L. No. 419. In U. S. circuit court, eastern district of Texas, at Jefferson. Andy Archibald vs. The Texas & Pacific R'y Co. Certified copy of transcript of proceedings in the circuit court at Jefferson.

38 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1895.

MONDAY, April 20, 1896.

(*Extract from Minutes.*)

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error, }
v.
 ANDY ARCHIBALD, Defendant in Error. }

This cause came on to be heard this day and was submitted to the court after argument by Mr. T. J. Freeman, for plaintiff in error, with leave to defendant in error to file brief herein within fifteen days from this date.

39 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1895.

MONDAY, June 15, 1896.

(*Extract from Minutes.*)

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error, }
v.
 ANDY ARCHIBALD, Defendant in Error. }

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Texas and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of said circuit court in this cause be, and the same is hereby, affirmed at the cost of plaintiff in error.

40 *Petition for Writ of Error.*

United States Circuit Court of Appeals for the Fifth Circuit.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in }
 Error, } No. —.
vs.
 ANDY ARCHIBALD, Defendant in Error.

To the Honorable Melville W. Fuller, Chief Justice, or to any associate justice of the Supreme Court of the United States:

Now comes the Texas and Pacific Railway Company, by its attorney, and complains that in the record and proceedings, and also in the rendition of the judgment of the United States circuit court of appeals for the fifth circuit, sitting at New Orleans, in the above styled and numbered cause, on the 15 day of June, 1896, affirming the judgment of the United States circuit court for the eastern district of Texas in said cause, manifest error hath intervened, to the great damage of the said The Texas and Pacific Railway Company; that the jurisdiction of the circuit court

for the eastern district of Texas in this cause depended upon the fact that The Texas and Pacific Railway Company, defendant therein, was a corporation created by an act of Congress; that the amount involved herein and the matter in controversy exceed one thousand dollars, besides costs, and this is not a case in which the jurisdiction of the circuit court of appeals is made final.

Wherefore it prays for allowance of writ of error, to the end that this cause and said judgment may be carried to the Supreme Court of the United States, and it prays for supersedeas of said judgment and such other process as may cause the same to be corrected by the said Supreme Court.

(Signed)

T. J. FREEMAN,

Attorney for the Texas and Pacific Railway Co.

42 Writ of error and supersedeas allowed and bond fixed at the sum of \$5,000 this the 1st day of July, 1896.

(Signed)

JOHN M. HARLAN,

Associate Justice of the Supreme Court of the United States.

Endorsed: Filed June 25, 1896. J. M. McKee, clerk.

43

Assignments of Error.

United States Circuit Court of Appeals, Fifth Circuit.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in	} No. —.
Error,	
<i>v.</i>	
ANDY ARCHIBALD, Defendant in Error.	

Now comes The Texas and Pacific Railway Company, plaintiff in error, by its attorney, and says that in the record and proceedings in the above-entitled cause there is manifest error, in this, to wit:

I.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas.

44

II.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, which is as follows:

"If you believe that the defendant company had car inspectors at Shreveport, but that it was not their duty under their employment to inspect cars that came from other roads on to defendant's tracks merely for the purpose of being loaded and returned, and if the cars that plaintiff was uncoupling when he was injured had been brought from the Cotton Belt road to be loaded with oil and returned to said road, and if the plaintiff knew [or by the exercise of ordinary care could have known] that it was the custom of the

defendant company not to inspect cars that were brought in as they were to be returned, then the plaintiff would be held to assume the risk of being injured by reason of defects in said cars, and in such case he cannot recover."

The court gave said charge after erasing the words between brackets as shown above. The court erred in making said erasure and not giving said charge as requested without any erasure.

III.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas
45 and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, which is as follows:

"It appears in this case that plaintiff was injured while uncoupling two cars that did not belong to defendant company, but had been brought from the Cotton Belt road to be loaded and returned to that road. Now, if you believe it was the custom of defendant company not to inspect or repair cars when thus brought over to be loaded and returned, and the plaintiff knew this custom [or could have known of it by the exercise of ordinary care], then he assumed the risk of being injured by any defect in said car and cannot recover."

The court gave this charge after erasing the words between brackets, as shown above. The court erred in making this erasure and in not giving said charge as requested without any erasure.

IV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas and in holding that said court committed no error in refusing to give
46 special charge asked by plaintiff in error, which is as follows:

"The duty to inspect cars coming from other roads applies only when the car is to be sent out on the receiving road, and does not apply when cars are switched from one road to be loaded and returned to the road from which they were received."

V.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, which is as follows:

"It is the duty of a railroad company to use ordinary care in keeping the cars which their employes are called on to handle in repair, so as not to expose their employes to unnecessary danger, and this duty exists to use ordinary care to inspect cars that come from other roads to be hauled over their own roads. What is ordinary care is always measured by the facts and circumstances of the particular case, and ordinary care means more care in one case than in another. The amount of care and caution to inspect cars com-

ing from other roads to be merely loaded and returned to the other road is not so great as when the car is to be sent out of the road of defendant, because, in the first place, the car is to be handled only by switchmen, who have a much better opportunity to observe any defect and protect themselves than the trainmen do when a car is placed in a train and sent out on the road. Now, if the defendant used ordinary care to discover and repair defects in the car in question under the circumstances in this case, then defendant is not liable."

VI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, which is as follows:

"That in the absence of any evidence on the point it would be presumed, from the circumstances of this case, that the plaintiff knew the custom of the defendant—not to inspect cars in the Shreveport yard that were switched from other roads to be loaded and returned to the road from which they came."

Wherefore The Texas and Pacific Railway Company, plaintiff in error, prays that said judgment be reversed, and it will ever pray.

(Signed)

T. J. FREEMAN,

Attorney for The Texas & Pacific Ry Co., Plaintiff in Error.

Endorsed: Filed June 25, 1896. J. M. McKee, clerk.

49

Writ of Error Bond.

Know all men by these presents that we, The Texas and Pacific Railway Company, a corporation duly incorporated, as principal, and George J. Gould, of Lakewood, New Jersey, as surety, are held and firmly bound unto Andy Archibald in the full and just sum of ten thousand dollars (\$10,000), to be paid to the said Andy Archibald, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, by these presents.

Sealed with our seals and dated this the 30th day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a regular term of the United States circuit court in and for the eastern district of Texas, sitting at Jefferson, Texas, at the September term, 1895, in a suit pending in said court between Andy Archibald, plaintiff, and The Texas and Pacific Railway Company, defendant, a judgment was rendered against the said The Texas and Pacific Railway Company for the sum of five thousand dollars (\$5,000), besides costs of suit; and

Whereas from said judgment the said The Texas and Pacific

50 Railway Company duly obtained a writ of error from the United States circuit court of appeals for the fifth circuit, which court on the 15th day of June, 1896, rendered a judgment affirming said judgment in all particulars; and

Whereas the said The Texas and Pacific Railway Company has sued out a writ of error from the Supreme Court of the United States and filed a copy thereof in the aforesaid suit, and also a citation directed to the said Andy Archibald, citing and admonishing him to be and appear at said Supreme Court of the United States, at Washington, within thirty (30) days from the date thereof:

Now, the condition of the above obligation is such that if the said The Texas and Pacific R'y Co. shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed)

THE TEXAS AND PACIFIC
RAILWAY COMPANY,

By GEO. J. GOULD, *President*.

GEO. J. GOULD.

[SEAL.]

[SEAL.]

(Signed)

Attest: (Signed) C. E. SATTERLEE, *Sec'y*.

Witness:

(Signed) D. D. DUNCAN.

51 The foregoing bond is approved, to operate as a supersedeas.

July 1st, 1896.

(Signed)

JOHN M. HARLAN,

*Associate Justice of the Supreme Court
of the United States.*

Endorsed: Filed July 3rd, 1896. J. M. McKee, clerk.

52

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the fifth circuit,
Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals, before you or some of you, between The Texas and Pacific Railway Company, plaintiff in error, and Andy Archibald, defendant in error, a manifest error hath happened, to the great damage of the said The Texas and Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein

53 given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things

concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice
[SEAL.] of the United States, the first day of July, in the year of
our Lord one thousand eight hundred and ninety-six.

(Signed)

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

Allowed by—

(Signed) JOHN M. HARLAN,

*Associate Justice of the Supreme Court
of the United States.*

Endorsed: Filed July 3, 1896. J. M. McKee, clerk.

54 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1895.

(Filed June 15, 1896.)

THE TEXAS & PACIFIC RAILWAY Co., Plaintiff in Error, }
v. } No. 444.
ANDY ARCHIBALD, Defendant in Error.

Error to the United States circuit court, eastern district of Texas.
Before McCormick, circuit judge, and Boorman and Speer, district judges.

BOARMAN, district judge, delivered the opinion of the court:

55 On 29th day of January, 1894, Andy Archibald, defendant in error, while he was in the employment of said railway company, the plaintiff in error, as a switchman in the said company's yards at Shreveport, La., had his arm mashed, and in consequence of such injury he lost his arm.

The defendant in error instituted his suit to recover damages against the plaintiff in error in the State district court of Harrison county, Texas. The cause was removed to and tried in the United States circuit court for the eastern district of Texas. The defendant in error recovered judgment against said railway company for five thousand dollars (\$5,000), from which said judgment the said railway company prosecutes the writ of error.

Plaintiff's petition alleges that on or about the 20th day of January, 1894, he was in the employment of the said Texas & Pacific Railway Company as a switchman in its yards at Shreveport, Louisiana, under the immediate orders of the yardmaster of said defendant, one Howell, and was on that day performing his duties in the

said yard, working under the orders of the yardmaster Howell. He shows that Howell had control of plaintiff and all switchmen in said yard, and they were by the rules of the service bound to obey orders of Howell. He shows that said company also keeps at

- 56 Shreveport an officer called the car inspector, whose duty it is to inspect all cars that come into said yard, whether they come in over the defendant's railway or some other connecting road, as soon as the cars come into the yard and to mark said cars as may be out of fix in any of their appliances, so that the trainmen or switchmen may know at the time he comes to handle the car whether it is safe or unsafe to handle, and for the purpose of advising the trainmen or switchmen of their condition writes on both sides of the car with chalk the letters "B. O.," which means that the car is in bad order, but on cars that are safe to handle he writes nothing at all, and by these marks the train and switch men know a car is in or out of fix when they come to handle it; that there is at Shreveport a cotton-seed oil mill, and on this track cars to be loaded or unloaded at the oil mill are placed, and when ready they are moved from the oil-mill track out upon the main yard track; that on January 20th, 1894, three cars were pulled out from the oil-mill track onto the main yard track, and plaintiff was ordered by Yardmaster Howell to uncouple two of these cars, both being oil-tank cars belonging to the American Cotton Seed Oil Company and marked A. C. O. and numbers 351 and 383, and both provided with patent pin-pullers, which *is* attached to the end of the cars, having a lever, by means of which the coupling pin can be drawn from or inserted in the drawhead without the switchmen being required to go in between the cars, as he has to do with
- 57 cars not provided with pin-pullers, which also makes it more difficult to pull out the pins for — any cause the pin-pullers are out of fix.

He shows that when he went to pull the pin he found that the pin-pullers on both cars were out of fix and could not be worked, and that in order to obey the orders of the yardmaster he was compelled to reach over the castings that formed a part of the pin-puller in order to reach and pull the pin with his hand after the usual fashion of doing that kind of work, the castings on each side of the drawhead making it somewhat more difficult to reach and pull the pin than in cars that were without such appliances. He shows that while he was pulling the pin and while the cars were moving slowly, as is usual and customary in coupling cars, he was struck on the leg by an iron rod from the rear car and which fastened the brake-beam to the *break*-staff and which had come loose from its fastenings; that this iron rod had on the end a chain about twelve inches long and was by the motion of the car pushed out in front of the car about three feet into the space between the two cars and about six inches from the ground; that as he was pulling the pin this rod struck his leg and was liable to trip him up, and in attempting to avoid being thrown down by the rod his arm was caught between the castings on the drawhead, crushing the bones at, above, and below the elbow-joint of his right arm

and injuring same to such an extent that amputation of the right arm became necessary to save his life; that

58 he did not know that the cars were out of condition until he went to uncouple them, when he discovered that the

pin-pullers of both cars were out of order, and that as he would have to uncouple them as if they had no pin-pullers, by going between the cars and pulling the pin with his hands, and as he did not know of the iron rod being loosened from the brake-beam until it struck him on the leg and until the loose chain and hook on the protruding end was about *the* trip him up, that he could not obey the order of the yardmaster to uncouple the cars without doing just as he did, by pulling the pin with his hands, which is the usual and customary way of uncoupling cars, and practically without any danger, but he shows that the loose rod protruding from the rear car and striking against his feet greatly enhanced the danger, because it was liable to trip him or the loose chain and hook was liable to catch his foot and leg and throw him down between the cars, and in endeavoring to avoid the danger from the loose rod and chain his arm was caught, as before charged, and crushed. He shows that these cars had been in the yard for over a day, and there was no mark of any kind on either to indicate that they were not in perfect order, and he did not know or believe that he was incurring more than ordinary danger of the service in obeying the order of his superior in uncoupling said cars, and while he did see the pin-pullers on both cars were out of fix and could not be worked, yet the danger of uncoupling

59 without them was not greater than is usual in uncoupling cars not provided with pin-pullers; not one car in fifty in use *are* provided with pin-pullers, but *are* coupled and uncoupled by hand; that his injury was not caused by the pin-pullers being out of fix, but was caused by the loose rod striking against his feet, and to avoid being thrown down he was forced to turn his attention to the rod, and in endeavoring to avoid that danger his arm was caught between the castings on the drawhead and crushed, as aforesaid; that he was not at fault, and was injured by the gross negligence of the defendant in failing to inspect and repair its said cars, and in failing to fasten the rod to the brake, and in failing to notify the plaintiff that said rod was loose from its fastenings and liable to trip and throw him down while he was uncoupling said cars; that the bones of his arm above and below the elbow *was* crushed to pieces, and the joint was smashed until the crushed bones protruded through the flesh and skin, and the arm had to be amputated above the elbow to save the life of petitioner, and that in consequence he has been deprived of the use of his right arm; that at the time of his injury he was twenty-three years of age and was healthy, strong, and active and able to do any amount of hard

60 work; that he had been working as a brakemen and switchman on railroads for four or five years and had adopted that business as a means of livelihood; that he was earning at the time he was hurt about seventy-five dollars per month, and his prospects were good for much larger wages as he grew older and

had more experience in the business in which he was engaged, but that the loss of his right arm totally prevents him from following the business in which he was engaged and also from following any other business; that he is not an educated man and cannot earn anything except by manual labor.

The plaintiff in error filed in the State court a general denial, and, in answering further, alleged that if there were any of the defects complained of in plaintiff's petition that the same were known to him, and that he assumed the risk thereof.

The transcript shows, in aid of the bill of exception, all the evidence administered by either side to the jury; there seems to have been but little, if any, conflict in the testimony upon the material issues of fact, and the verdict of the jury and the judgment thereon seems to be fully sustained by the evidence.

The errors assigned are to the charge of the court; they relate to the charges given as well as to the charges tendered by the counsel for plaintiff in error and refused by the court. We have carefully examined the several assignments of error filed by plaintiff in error,

61 together with the evidence shown in the transcript, in the light of the authorities cited in counsel's briefs, and we find no errors alleged in any of the several assignments sufficient to warrant us in reversing the judgment of the circuit court; therefore the same is—

Affirmed.

62 United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the above and foregoing 61 pages, numbered from 2 to 62, inclusive, contain a true copy of the record, pleas, process, and all papers in the case of The Texas & Pacific Railway Company, plaintiff in error, *v.* Andy Archibald, defendant in error, No. 444, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof I hereunto
Seal United States Circuit Court of Appeals, Fifth Circuit.
subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this — day of July, A. D. 1896.

J. M. McKEE,

Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

63 UNITED STATES OF AMERICA, ss :

To Andy Archibald or his attorney of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the fifth circuit, wherein The Texas and Pacific Railway Company is plaintiff

in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this first day of July, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN M. HARLAN,

Associate Justice of the Supreme Court of the United States.

64

I accept service of the within citation in error.

July 7, 1896.

JAMES TURNER,

Attorney for Andy Archibald.

[Endorsed:] Filed July 10, 1896. J. M. McKee, cl'k.

Endorsed on cover: Case No. 16,346. U. S. circuit court of appeals, 5th circuit. Term No., 207. The Texas & Pacific Railway Company, plaintiff in error, vs. Andy Archibald. Filed July 29, 1896.

MAR 24 1898
JAMES H. McKENNEY,
CLERK

No. 207.
Ex. of Dillon, Pierce & Duncan
for P. C.

Supreme Court of the United States.

OCTOBER TERM, 1897

Filed Mar. 24, 1898.

NO. 207.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

v.s.

ANDY ARCHIBALD.

**ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FIFTH CIRCUIT.**

BRIEF FOR PLAINTIFF IN ERROR.

**JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID H. DUNCAN,**
Counsel for the Railway Company.

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE TEXAS AND PACIFIC RAILWAY
COMPANY,
Plaintiff in Error,

vs.

ANDY ARCHIBALD.

No. 207.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This suit was originally brought by Andy Archibald, a citizen of Shelby County, in the State of Texas, against The Texas and Pacific Railway Company, a corporation created by An Act of Congress, in the District Court of Harrison County, Texas, and was removed to the Circuit Court of the United States for the Eastern District of Texas, on the ground that a federal question was involved, the defendant being a federal corporation.

Plaintiff alleged that on January 20th, 1894, he was a switchman in the employ of the Railway Company in its yards at Shreveport, Louisiana, working under the orders of one Howell, the yardmaster; that the company employed a car inspector whose duty it was to

inspect all cars coming into the yard, "whether they came in over the defendant's railway or some connecting road," and to mark such as he had found to be "out of fix in any of their appliances" for the purpose of advising switchmen of their condition; that on January 20th, 1894, three oil-tank cars belonging to the American Cotton Seed Oil Company were pulled from a side track or branch leading to and for the accommodation of that company's oil mill, and that plaintiff was ordered by the yardmaster to uncouple two of them; that the cars were provided with patent pin-pullers, which would not work, and he was compelled to uncouple them in the ordinary way, and that in attempting to do so a loose rod hanging from one of the cars and projecting into the space between the cars struck him on the leg diverting his attention so that his arm was caught between the draw-head castings, occasioning the injury complained of. Plaintiff expressly says "that his injury was not caused by the pin-pullers being out of fix, but was caused by the loose rod striking his feet" (Tr., p. 3). He alleged negligence on the part of defendant "in failing to inspect and repair said cars and in failing to fasten the rod to the brake and in failing to notify the plaintiff that said rod was loose from its fastenings and liable to trip and throw him down while he was uncoupling said cars" (Tr., p. 3). He also alleged that "his injury was the result of the negligence of said company in its failure to have said cars inspected and in failing to have same repaired, or at least in failing to mark them as out of condition, so that persons working with them would know their condition."

Defendant demurred generally, pleaded the general issue and by way of special plea alleged that "defend-

ant [plaintiff] knew the condition of the cars and track where and when he was hurt and assumed the risk of being thereby injured " (Tr., p. 5).

It appeared on the trial that the yards of the " Cotton Belt " road and those of the Texas and Pacific Railway lie side by side, and that on the side of the Texas and Pacific yards, opposite those of the Cotton Belt there was a short spur track to an oil mill—the distance from the Cotton Belt yards across the Texas and Pacific yards to the oil mill, being variously stated as being 200 or 250 yards; and also that the Texas and Pacific Company's car inspector was stationed at the Junction, about two miles from the yards, where cars received from or to be delivered to other roads were inspected; that there was no inspector at the yards, and that cars merely switched across the yards to be loaded and returned were never inspected (Tr., p. 12).

On the trial plaintiff testified (Tr. pp. 9 and 10) to the details of the accident substantially as he had alleged in his petition. He also said (Tr., p. 10) :

" I was hurt on the main track. The cars had been taken out of the oil-mill track a few moments before. They had been placed on the oil-mill track two or three days before that to be filled with oil."

Mr. Vance, for plaintiff, testified (Tr., p. 11) :

" The cars had been on the oil-mill switch two or three days. * * * I did see before Archibald was hurt a rod sticking out from under one end of the cars; it was while weighing these cars and adjusting the scales that I had to step over this rod in order to get in and out from between the cars on the oil-mill switch. On the day Archibald was hurt this rod stuck out about two or three feet between the cars. I had to step over it to get to the couplings."

Defendant's witness Howell, the yardmaster, tes-

tified (Tr., p. 11) that the cars were American Oil Co. cars; that they

"came from the Cotton Belt to the yard at Shreveport; they were brought over there for the purpose of loading cotton seed oil into them from the Union Oil mill." * * * "After the oil was loaded into them they were delivered to the Cotton Belt; from the place where these cars were delivered to the Cotton Belt road to the place where Archibald was hurt it was about 200 yards, I guess, and the cars were received from the Cotton Belt at the same place where they were delivered to it;" and that "the purpose for which the cars were being moved was that the oil mill had one of the cars loaded and wanted us to take that out and put the empty one at the oil mill." He also said "the distance from the place where the oil was loaded on the car to where Archibald got hurt is about forty or fifty yards, I guess. It is just a side track that runs out to the oil mill there from the main line."

On Cross-examination (Tr., p. 11) Mr. Howell said: "that car came into my yard. We had no car inspector there; there was no car inspector in the Shreveport yards. We had one at Shreveport Junction, but none down in the yards."

Mr. Jones, for defendant, testified (Tr., p. 12): "my occupation at that time was car inspector at Shreveport Junction. My duty was to inspect all cars coming in over our lines into Shreveport Junction and to inspect all cars coming from connecting lines going out over our lines, but switch cars I never inspect, that is, cars from the Cotton Belt transferred to some point in our yard to be delivered back to the Cotton Belt either loaded or empty; it is the duty of the Cotton Belt inspector to inspect those cars and mark them."

Mr. Harris, for defendant, testified (Tr., p. 13):

"Those cars were put in the yard that morning from the Cotton Belt connecting track. They were put there to be loaded with oil by the Union Oil Company, and were to be delivered back to the Cotton Belt Railroad; that was done."

There was a verdict and judgment in favor of plaintiff for \$5,000 (Tr., p. 18).

On writ of error to the United States Court of Appeals for the Fifth Circuit, the judgment below was affirmed at the costs of the plaintiff in error (Tr., p. 24).

From this judgment of affirmance The Texas and Pacific Railway Company has sued out a writ of error to this court.

Assignments of Error.

Now comes The Texas and Pacific Railway Company, plaintiff in error, by its attorney, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit :

I.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas.

II.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, which is as follows :

“ If you believe that the defendant company had car inspectors at Shreveport, but that it was not their duty under their employment to inspect cars that came from other roads on to defendant's tracks merely for the purpose of being loaded and returned, and if the cars that plaintiff was uncoupling when he was injured had been brought from the Cotton Belt road to be

loaded with oil and returned to said road, and if the plaintiff knew [*or by the exercise of ordinary care could have known*] that it was the custom of the defendant company not to inspect cars that were brought in, as they were, to be returned, then the plaintiff would be held to assume the risk of being injured by reason of defects in said cars, and in such case he cannot recover."

The court gave said charge after erasing the words between brackets as shown above. The court erred in making said erasure and not giving said charge as requested without any erasure.

III.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in refusing to give special charge asked for by plaintiff in error, which is as follows :

"It appears in this case that plaintiff was injured while coupling two cars that did not belong to defendant company, but had been brought from the Cotton Belt road to be loaded and returned to that road. Now, if you believe it was the custom of defendant company not to inspect or repair cars when thus brought over to be loaded and returned, and the plaintiff knew this custom [*or could have known it by the exercise of ordinary care*], then he assumed the risk of being injured by any defect in said car and cannot recover."

The court gave this charge after erasing the words between brackets, as shown above. The court erred in making this erasure and in not giving said charge as requested without any erasure.

IV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, which is as follows :

“ The duty to inspect cars coming from other roads applies only when the car is to be sent out on the receiving road, and does not apply when cars are switched from one road to be loaded and returned to the road from which they were received.”

V.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, which is as follows :

“ It is the duty of a railroad company to use ordinary care in keeping the cars which their employees are called on to handle in repair, so as not to expose their employees to unnecessary danger, and this duty exists to use ordinary care to inspect cars that come from other roads to be hauled over their own roads. What is ordinary care is always measured by the facts and circumstances of the particular case, and ordinary care means more care in one case than in another. The amount of care and caution to inspect cars coming from other roads to be merely loaded and returned to the other road is not so great as when the car is to be sent out of the road of defendant, because, in the first place, the car is to be handled only by switchmen who have a much better opportunity to observe any defect and protect themselves than the train men do when a car is placed in a train and sent out on the road. Now, if the defendant used ordinary care to discover and repair defects in the car in question under the circumstances in this case, then defendant is not liable.”

VI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, which is as follows :

“ That in the absence of any evidence on the point it would be presumed, from the circumstances of this case, that the plaintiff knew the custom of the defendant—not to inspect cars in the Shreveport yard that were switched from other roads to be loaded and returned to the road from which they came.”

ARGUMENT.**I.**

When a servant enters into an employment he assumes all the risks ordinarily incident to the business, and is presumed to have contracted with reference to all the hazards and risks attending his employment. He cannot recover for injuries resulting to him therefrom.

This general principle is well settled and has been recognized by this Court.

Tuttle vs. Milwaukee Ry., 122 U. S., 189.

Randall vs. Baltimore & Ohio Rd., 109 U. S., 478, and cases cited.

Included among such risks are those arising out of the master's mode of conducting his business, though a safer one might

have been adopted, if the servant knows the custom of doing business and the risk occasioned thereby, or could know it by exercising ordinary care, and continues in his employment.

This proposition we regard as self-evident—a necessary corollary to the general rule above stated. The methods of doing business must necessarily be taken into account when the contract of employment is made in the same way that the character of the machinery in use is considered, which, as is well settled, need not be of the latest or even of the safest pattern.

The authorities recognizing this proposition are referred to below.

Applying these principles to the facts of this case we claim and insist that :

The question whether plaintiff, by exercising ordinary care, could have known that cars which were merely switched across the Texas and Pacific Railway Company's yard to be loaded and returned, and not bound out on its line, were never inspected by the company's car-inspector should have been submitted to the jury.

The second and third assignments of error may, for the purposes of this argument, be considered as the same. They complain of the action of the trial court in refusing to give instructions as requested by the defendant, and in giving them after striking out what we regard as the most important part of them.

The instructions, as requested by the Railway Company, were to the effect that, if plaintiff knew, *or, by*

the exercise of ordinary care, could have known, that it was not the custom of the company to inspect cars which were in its possession merely to be transported across its yards to be loaded and returned, then plaintiff could not recover.

The trial court gave both instructions after striking out of the second the phrase, "*or by the exercise of ordinary care could have known*" (Tr., p. 16), and out of the third the words, "*or could have known of it by the exercise of ordinary care*" (Tr., p. 17), thus confining the jury to proof of the actual knowledge of plaintiff concerning the custom of not inspecting cars which were in its custody merely for the purpose of being loaded and returned.

The Judge presiding at the trial recognized the principle we contend for in his charge respecting the broken rod. He said (Tr., 16) :

"If you believe that the accident was caused by a broken rod, and that that was open and patent to him, or that he saw it, or that, by the exercise of ordinary care, he might have seen it; in that event he cannot recover."

In the next sentence the learned Judge, charging as to the custom of not inspecting this particular class of cars, required defendant to prove *actual knowledge* of such custom by the plaintiff, and later, as we have seen, declined to charge that plaintiff could not recover if, by the exercise of ordinary care, he could have known of the custom of not inspecting such cars. The action of the Court is the more difficult to understand in view of the fact that plaintiff, in his complaint (Tr., p. 4, fol. 8), alleged that "his injury was the result of the negligence of said company in its failure to have same *inspected*, and in failing to have same repaired,

or at least, *in failing to mark them as out of condition*, so that persons working with them would know their condition." He based his action on the alleged negligence of the company in failing to *inspect* the cars and in not marking them as out of condition.

Archibald had ample time and opportunity to know the rules and customs of the company relating to cars and their condition. He admits (Tr., p. 9) that he had been in the Company's employment as switchman about three months. By the Station Agent (Tr., p. 14) it was shown that, on the average, two or three cars a day were shipped from the oil-mill track, and that of these between twenty and twenty-three were so shipped for the Cotton Belt road in January, 1894, the month in which plaintiff was injured.

It is also shown by the yard master (Tr., p. 11) and the car inspector (p. 12) that there was not, and had not been, any inspector at the yards, and that cars switched from the Cotton Belt across the yard of the Texas and Pacific Railway Company to the oil-mill track and back again, a distance of only 200 or 250 yards, were not inspected by any officer or employee of the Texas and Pacific Company.

It is unreasonable to assume that, under these circumstances, plaintiff did not know of these facts. He certainly could have known them by exercising ordinary care.

It is apparent that it was impracticable to inspect the cars received from the Cotton Belt road to be drawn across the Texas and Pacific yards to the oil mill, a distance of, at most, only 250 yards, and to inspect them again after being loaded and before being returned, and also that an inspection of the car in ques-

tion by a regular car inspector was not necessary to discover the defect complained of.

The object of inspecting cars, so far as it relates to liability for injuries, is not to apprise employees or others of patent defects in machinery or appliances. It is to detect latent defects—those not ordinarily discoverable by careful and prudent men, such as cracks in wheels, loose bolts, &c.

Even if it had been the custom of the company to inspect cars of this description, plaintiff would not have been thereby absolved from the duty of exercising ordinary care to discover the defect complained of. This is conceded in the charge of the Court.

The testimony shows conclusively that cars received from the Cotton Belt Road to be transported across the yards of defendant to the oil-mill sidetrack were never inspected, and that there was no inspector at the yards at any time, all inspections being made at the Junction a mile or more away.

We confidently claim that plaintiff had every opportunity of knowing this rule and custom, and by exercising ordinary care would have known it if he did not actually know it. We also claim, with equal confidence, that the question whether by exercising ordinary care he could have known it should have been submitted to the jury; that in a case, as here, where plaintiff seeks redress on the ground that defendant was negligent "in failing to mark them [the cars] as out of condition, so that persons working with them would know their condition," defendant should not be required to prove *actual knowledge* of these facts by the plaintiff.

The importance of the action of the court in modifying the instructions as they were requested lies in the

fact that its effect was to mislead the jury as to the assumption by the plaintiff of the risks of his employment—defendant's principal defense. In effect the court told the jury that if the plaintiff *knew* it was not the custom of defendant to inspect cars merely in its possession for transportation across its yards to be loaded and returned, then and in such case he would have assumed the risks of his employment and could not recover; but, on the other hand, if *actual knowledge* was not shown, that, although by exercising ordinary care he could have known the same fact of non-inspection, he did not assume such risks and could recover.

Defendant's defense of plaintiff's assumption of the risks incident to his employment was thus taken away from the jury unless they could find from the evidence that plaintiff did *in very fact* know of the custom of not inspecting cars of the same description as the one by which he was injured.

In the case of *Texas & Pacific Ry. Co. vs. Minnick*, 13 U. S. App., 520 (s. c., 57 Fed. Rep., 362), one of the questions involved was whether plaintiff's decedent knew or could have known by exercising ordinary care that it was not the rule or custom of the railway company to have a watchman or trackwalker on the bridge where decedent was killed, and the Court said (p. 526):

"We think it a well established principle of law that an employee assumes the risks ordinarily incidental to the business, and the manner of the employer's performing it, where there is no defect of machinery or unknown hazards."

On the second appeal of that case 23 U. S. App. 310; s. c. 61 Fed. Rep., 632, *McCORMICK*, C. J., said (p. 317):

"He knew, or with the exercise of ordinary care incumbent on him in his employment would have known, and must therefore be presumed to have known, the customary daily watch that was kept on the track and bridges, and that there was no trackwalker kept on this part of the track, or watchman kept at this bridge. He knew and understood the features and workings of the engines, and the character and extent of the watch that was kept on this bridge. He therefore, according to the settled rule just given, assumed the risk of being injured by the use of such machinery on the track and bridges thus watched. He assumed the risks incidental to the precise state of facts and service out of which the plaintiffs by their pleadings and proof attempt to deduce the liability for the defendant company for his tragic death."

In *Hewitt vs. Flint & Pere Marquette R. R. Co.*, 67 Mich., 61, it was the habit of the railway company to allow cars to run from an elevator on a side track to the main line wholly unattended by a brakeman, and plaintiff was injured by a car so running to the main track. Referring to the method and custom of the railroad company in using its side tracks, the Court said :

"The Court declined to give the defendant's sixteenth request, which is as follows :

" 'A railroad company is not bound to change its manner of using its side tracks, nor to adopt the most approved ways or appliances in business. And if one of its servants, knowing, or having ample means of knowing from long-continued employment, the way and manner in which the side tracks are used, continues in the employment without complaint, and if from such way and manner is subjected to risks of accident, he is presumed to assume such risks, and, if injured thereby, cannot recover.' "

"This request should have been given. It states the rule correctly."

The legal presumption is that one knows that which he has the opportunity of knowing. The jury should

have been allowed to pass upon the evidence as to plaintiff's opportunity of knowing the custom of not inspecting these cars.

The trial Court erred in refusing to give the instruction as it appears in the sixth assignment of error.

In *Chicago R. T. & P. Ry. vs. Linney*, 4 U. S. App., 315, 318; s. c., 59 Fed. Rep., 45, 47—a case in many respects similar to the one at bar—the Court struck out of an instruction, as requested by the defendant, words conveying the same meaning as those stricken out by the trial Judge in this case. Circuit Judge SANBORN said :

“ It goes without saying that it is the general rule that the servant assumes the ordinary risks and dangers of the employment upon which he enters, not only so far as they are known to him, but also so far as they would have been known to one of ordinary prudence and sagacity in his situation by the exercise of ordinary care (*Bohn Manufacturing Company vs. Erickson*, 12 U. S. App., 260; *Northwestern Fuel Company vs. Danielson*, 12 U. S. App., 688.) Moreover, *this rule should be carefully given to the jury in the charge of the Court in every case in which the issues and the evidence make it applicable, and the declaration of it is not rendered futile by more specific instructions that clearly and properly guide the jury as to their findings upon the issues and evidence presented in the particular case on trial.*”

In that case it was held that other portions of the charge to the jury “supplemented and qualified the portion of the charge objected to, and left it without just ground for exception.” In this case no such reason exists for not applying the rule so announced.

The judge's charge confined the jury to proof of *actual knowledge* by plaintiff of the custom of not inspecting cars to be loaded and returned (Tr., p. 16). Nothing whatever appears in the instructions given to the jury

permitting them to take into consideration plaintiff's opportunity of knowing the custom referred to.

Plaintiff testified (Tr., p. 9) he had been employed as a switchman in the defendant's yard at Shreveport for three months prior to the day when he was injured. By other witnesses it was proved (Tr., pp. 13, 14) that, on an average, 35 or 40 cars a day were handled in that yard; that at the season of the year (January, 1894) when the accident occurred about 40 cars a day were handled there, and that of these between 20 and 23 were cars transferred from the Cotton Belt road to the oil mill in the same month of January, 1894.

It is entirely improbable that plaintiff, during all this time and under these circumstances, did not notice that cars going to the oil mill to be loaded and returned were not inspected and were never marked when in bad order, as the others were. In fact, one who considers what his duties were, and his opportunity for knowing what was, to him, a matter of great personal importance, must be convinced that he did know these facts and that he did know of this feature of the company's habit of transacting its business.

But the jury were prevented from considering these facts by the refusal of the court to give the instructions set out in the second and third assignments of error as they were presented, and by striking out of them their most important feature, as well as by its charge to the jury, in effect, that only proof of *actual knowledge* by plaintiff of defendant's method of transacting its business in this respect could be considered by them.

We submit that this was clearly error, for which the judgment should be reversed and the cause remanded.

II.

The duty to inspect cars coming from other roads applies only when the cars are to be sent out on the receiving road and does not apply when cars are switched from one road to be loaded and returned to the road from which they were received.

This question is presented by the fourth assignment of error.

It has been held (*Baltimore & Potomac vs. Mackey*, 157 U. S., 72; *Gottlieb vs. N. Y. & L. E. R. Co.*, 100 N. Y., 462; *Goodrich vs. N. Y. Central, &c., Co.*, 116 N. Y., 116) that a railroad owes to its employees the duty to inspect all cars *before sending them out on its road*, but we can find no case where the Courts have held that a car must be inspected when it is only switched or shifted from one yard to another and back again. In the case at bar it would have been most impracticable to have complied with the requirements of plaintiff's contention. It could hardly be required that the Texas and Pacific road would send a man to the Cotton Belt yard (assuming it had the right to send its employee there) to inspect the car before the switchmen went for it with the engine, and still less, that, after being loaded, the Texas and Pacific Company would have to send a man to inspect or repair it on the oil mill track when it was to be sent only 200 yards back to the Cotton Belt road. Carrying the car to the junction to be inspected would have been attended with more danger than was involved in returning it to the Cotton Belt road. The fact that the

car was permitted to remain at the oil mill several days cannot benefit the plaintiff, for it gave him a better opportunity to learn of the defects, as his witness, Vance, did.

In Flanagan vs. Chicago and N. W. Ry., 45 Wis., 103, a car had been pushed off the end of a spur track and broken ; and, while it was being carried to the shops, a switchman or brakeman, not knowing of the break, attempted to get on the car and was injured by reason of the broken part. The court said :

“ It is too clear for controversy that it was not negligence on the part of the defendant to suffer the broken car to remain at the end of the spur track where it was broken unrepaired as long as it chose. It is immaterial in this action whether it was suffered to remain there a day or a year. Negligence cannot be predicated of the delay, however protracted, to remove or repair it. It is equally clear that the defendant was not bound to repair the car before removing it from the spur track. It had the undoubted right to remove it to its yard or shop, where such work is usually done, and there repair it. Neither was it necessarily negligence of the defendant to put it in a train with other cars to take it to the repair yards or shops.”

The judgment under review should be reversed and the cause remanded for a new trial.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,

Counsel for Plaintiff in Error.

Warrant of Arrest for A. C. [illegible]

State of Texas, County of [illegible]

vs. [illegible]

TEXAS AND PACIFIC RAILWAY CO.

Plaintiff in Error

vs.

ANDY ARCHIBALD

Defendant in Error

TEXAS AND PACIFIC RAILWAY CO.
Plaintiff in Error.

vs

ANDY ARCHIBALD,
Defendant in Error

Cause pending in the Supreme Court of the United States at Washington, October Term A. D. 1897.

BRIEF FOR DEFENDANT IN ERROR.

We cannot altogether agree with the statement of the case contained in the brief for plaintiff in error, while in the main it is correct. Our objection is more to the idea conveyed than to the language used. The idea conveyed in the brief is, that there were two railroad yards, one at the junction, the other down town, while in fact there is but one railroad yard, which includes both the down town tracks as well as the junction tracks. Howell was yard master, both at the junction and down town; Jones was inspector and Archibald was one of the switch-

men who, under Howell, did the switching at Shreveport, whether at the junction or down town. The witnesses all speak of the territory as the Shreveport yard. (See evidence of Archibald, Tran. page 9 and of Howell page 11 and of Jones page 12 and of Harris page 13). From a review of the evidence there can be little doubt that the yard included both places and was all under Howell as yard master, with one inspector and one set of switchmen, Archibald being one of them. The company kept a car inspector in the Shreveport yard, Mr. Jones, who says that he did not inspect cars coming to the down town part of the yard, that he inspected at the junction.

The company kept a car inspector in the Shreveport yards is testified to by Archibald. (Trans. page 9. Both Howell, and Jones, the inspector, testify that no cars were inspected coming into the down town part of the yard. The defence to the action is right at this point, if indeed any defence was offered to it, viz: that the company did not inspect cars coming into the down town yard to be loaded and returned and that Archibald knew or with ordinary care could have known of this custom. There was no controversy as to how he was hurt, or as to

the agency causing the injury. It is not pretended that the car was not defective in the manner complained of, or that Archibald was not hurt just as he testifies, or that his right arm was not crushed and amputated. There is no denial of the fact that an iron rod connected with the brakes was loose from its fastenings, that there was a hook on the end with two or three feet of chain and that this rod was under the car and that when the car was moved so as to be uncoupled that the motion of the car pushed the rod out into the space in which Archibald was standing to do his work, in fact there is no denial of the condition of the car as Archibald states it, or that he was hurt just as he testifies. (*See Tran. pages 9 and 10.*) It is effect admitted that the car was in bad order and that the company had taken no steps to ascertain its condition, while requiring its servants to handle them.

The defense is a novel one, for it is simply this "the company neglected what the law says that it shall do, viz: furnish its servants with tools, cars and appliances reasonably safe and this neglect of duty is made its only defence, that Archibald knew or might have known that the company neglected a legal duty; that he knew or he might have known

that the company did not inspect cars coming into the yard to be loaded with oil."

The company required its servants to handle these cars, because Archibald and Howell both testify that he was working with and under the order of Mr. Howell when he was hurt. (*Tran.* pages 9 and 11.

It is the duty of the master to furnish the servant with tools and appliances, reasonably safe, for the work in hand. It is the duty of a railway company to furnish its servants with cars reasonably safe, if the servant is required to handle them. This is an absolute duty fixed on the master, which he cannot evade or delegate to another. *He must do this and for neglect there is no excuse except such hidden defects as cannot be discovered by careful inspection.*

Wharton on Negligence, sections 209-211; Rorer on Railroads 1211.

Cooley on Torts, p. 561; Hough vs. Ry. Co., 100 U. S., p. 215; 25 N. Y., p. 565; 105 N. Y., p. 159.

Out of the rule above stated has grown another, not so much a rule of law as a rule of practice among railroads themselves, that it is the duty of the company to inspect all cars which the servant is required

to handle, whether its own cars or the cars of another road and to know that they are in a reasonably safe condition. The duty is on the master to furnish safe cars when he requires the servant to handle them, the servant may presume that the master has obeyed the law and that the cars are safe. The servant is not required to inspect them, only he may not close his eyes to defects apparent from observation.

Ford vs. Ry. Co., 110 Mass., p. 240-260; 59 N. Y., p. 617; Ry. Co., vs. McElyea, 71 Texas, 386; Ry. Co. vs. Snyder, 152 U. S., 684; Ry. Co. vs. Herbert, 116 U. S., 652; Baily on Liability of Master to Servant, page 101.

The servant may rely on the master having performed his duty and need not inspect the car himself and the master is liable to the servant when he requires him to work with an unsafe car, when an inspection would have shown the danger.

Eddy vs. Prentiss 27th Southwestern Reporter, 1063.

There is no doubt that the plaintiff was required to handle this car, as well as all cars coming to be loaded with oil and he is injured while handling such a car, under orders from the yard master.

There is no doubt that an inspection would have disclosed the defect and have saved the plaintiff from injury, but the company says there is no liability, because we did not inspect cars coming to be loaded with oil and Archibald knew of the custom or he could have known it by the exercise of ordinary care.

What reason is given for not inspecting them? Did the company not require Archibald to handle them? Was the company not bound to furnish safe cars, where it required its servants to work with them? What then in reason or in law, released the company from this duty in respect to these cars, more than with others? One witness, Mr. Jones, the inspector, volunteered a statement, that it was the duty of the Cotton Belt road to inspect them and not the duty of the defendant company. But suppose that the Cotton Belt did not inspect, as it certainly did not inspect this car, did that road owe any duty to Archibald? It was under no obligation to furnish him with safe cars, that duty was on the defendant company whose servant he was. He is required to handle a car that is unsafe, the company gives him no warning of its condition so that he can be on guard against injury, but in response to his complaint for this neglect of duty it tells him, you

knew or you should have known, that cars coming for oil were not inspected and therefore you cannot recover. The idea seems to be that as these cars were only carried about a mile and placed on the oil mill track and returned when loaded, that there was no obligation on the company to furnish safe cars, or that it was under no obligation to look to their condition, although at the same time its servants are required to handle them. If the car only goes a mile and back, there is no need to look to its condition, but if it is to go an hundred miles, then it must be looked to. But the servant is injured within the mile while the master required him to handle such a car. Has the master performed the duty required of him by law? Has he furnished the servant with a safe car to handle? Surely the master must be liable.

Without doubt, the servant takes on himself the ordinary risks incident to the business in which he is engaged, but he takes no risk of negligence on part of the master, yet we are gravely told by the learned counsel in their brief, that although the company neglected its duty and failed to furnish cars reasonably safe to handly, that because the company failed to inspect such cars and because

Archibald knew or should have known, that it did not inspect them, therefore he cannot recover, in other words, because the company neglects one duty, it is thereby excused from another. The whole truth of the matter is in the volunteer statement of witness Jones, the company expected the Cotton Belt road to attend to these cars and failed to do so itself.

The contention of the learned counsel in their brief is this, that if Archibald knew that the company did not inspect such cars, or if by reasonable care he could have known it, then he cannot recover and such was the opinion in part of the judge who tried the case below. Archibald swore that he did not know of any such regulation or custom, and the judge charged that if he knew of the custom, he could not recover. The defendant then asked him to charge that if he knew of the custom or in the exercise of reasonable care he could have known it, he could not recover, but the judge would not go beyond the actual knowledge, and refused to give the charge as asked. This contention of the learned counsel is neither supported by reason or authority. Did the failure to inspect cause the injury, or was it the neglect to furnish reasonably safe cars? There

is no law requiring the master to inspect cars, but there is a law that the cars furnished shall be reasonably safe to handle. If he provides safe cars, it does not matter whether he ever inspects one. He may inspect them every hour in the day, but if he fails to remedy the defect, the inspection will not avail him. Inspection is a means by which the master finds the condition of the car, but it does not make it safe. The inspection enables the master to perform his legal duty to furnish safe cars, but it is not the only means. A car may never have been inspected, yet may be perfectly safe to handle; would it be for a moment contended, that if the car was reasonably safe, but had not been inspected, that a servant injured while handling it could recover because it had not been inspected? The charge given, as well as the charge refused, makes the plaintiff's right to recover to depend on his knowledge, of the custom not to inspect such cars, and to that extent is stronger against the plaintiff than the law permitted.

If the failure to inspect made the master liable of itself, and the suit was for that failure, then the knowledge of the plaintiff would possibly preclude him, or if the failure to inspect was the proximate

cause of the injury, then the knowledge of plaintiff would be a material issue in the case. But the cause of the injury, was the rod, loose from its fastenings, that struck the plaintiff and threatened him with injury greater than he received.

We will go a step further and say, that if Archibald had actual knowledge that the car with which he was working had not been inspected and was ordered by his superior to go and uncouple it, as he did, but knew not of the defective brake rod, loose from its fastenings and was injured in the manner shown by the evidence, he should recover, because the master has failed in a duty he owed to his servant to furnish reasonably safe cars. Because the servant has the right to believe that the master has done his duty and he is fully authorized to act on that belief, and is not required to examine as to their safety. Of course he would not be permitted to close his eyes to danger that would be apparent to any one approaching the car, but he need not look for defects that are hidden from ordinary observation.

(Rorer on Railroads, pages 1211 to 1217, where the whole subject is most ably discussed). Cooley on Torts, page 561. Railway Company vs. Herbert,

116 U. S. 652. Hough vs. Railway Company, 100 U. S. 215. Railway Company vs. Mackay, 157 U. S. 73. Ford vs. Railway Company, 110 Mass. 240. Railway Company vs. Snyder, 152 U. S. 684. 59 N. Y. 517. Crenshaw vs. Railway Company, 71 Texas 344. 25 N. Y. 565. 105 N. Y. 159. 61 Mo. 492. 38 Wis. 289. 65 Mo. 514.

The duty of railway companies in handling cars of other roads is practically the same in handling their own cars. This duty is ably discussed by Mr. Justice Harlan in the case of *Railway Company against Mackay*, 157 U. S., above cited, where he says: "The duty of a railway company to take due care that foreign cars hauled by them shall be in such condition as to be safely handled by its own employees. The employees are obliged to handle every car in the train in the same manner without respect to ownership and are exposed to the same danger from defects, that may attend the management of the cars of the road that employs them. It would be most unreasonable and cruel to declare that a faithful workman may obtain compensation from a company for a defective arrangement of its own cars; he would be without redress against the same

company if the damaged car that occasioned the injury happened to belong to another company. "

In the opinion in Mackay's case, Judge Harlan cites with approval the case of Gottlieb vs. Railway Company, 100 N. Y., in which the New York court says: "A railroad company is bound to inspect cars of another company used on its road just as it would inspect its own. It owes this duty as master *and is responsible for the consequences of such defects as could be disclosed by ordinary inspection.* When cars come in which have defects discernable, by ordinary examination, it must remedy the defects or refuse to take them. "

We have searched in vain for a single case, either in the text books or in the adjudged cases, that limits or in any manner varies the rule as to the duty of the master to furnish reasonably safe appliances for the servant to work with. It is a duty the master cannot evade. He may appoint agents to supply safe appliances, but their failure is his failure; he may appoint agents to inspect, to determine their safety, and their neglect is his neglect; they may inspect and may discover no defect, but if a proper inspection would have discovered the defect, he is liable; the inspection may discover the defect,

but unless remedied it is no defence. If, however, a proper inspection failed to discover the defect, then the master is not liable.

The cases quoted establish that the duty to furnish safe tools, cars and appliances, is on the master and may not be shifted or evaded. *He must exercise ordinary care to supply to the servant safe appliances and like care to keep them safe; he must use the same care to ascertain the safe condition of cars coming from other roads as he is to take of his own cars. If he requires the servant to handle the foreign car without looking to its safety and the servant is injured by some defect, that ordinary care would have disclosed and remedied, then the master is liable.*

But the defendant below required the court to go beyond actual knowledge of the failure to inspect these cars and asked the court to charge that Archibald, by the exercise of ordinary care, could have known of the custom not to inspect these cars, that he could not recover. The court refused to so charge, in this is the only question in the case.

The proposition stripped of its surroundings, is simply this: If Archibald knew the master was neglecting one of the means of ascertaining the condition of the cars, that he cannot recover. It makes

the inspection take the place and fill the measure of the master's duty and leaves out of the question his real duty to furnish safe cars. But it is not a legal duty to inspect any cars, the duty is to furnish safe cars and the inspection is only to enable the master to do his duty and is not itself the duty that he owes.

If the master knew the cars were safe, surely the failure to inspect them would not make him liable, and if they were not safe an inspection alone would not shield him from liability. If the inspection was a legal duty, which being performed, shielded the master from liability, it would be different, or if the failure to inspect made him liable, it would be different.

The charge was properly refused, because of the knowledge of Archibald of the custom not to inspect these cars would not relieve the master from his legal duty to furnish safe cars. Inspection alone would be no defence and the failure to inspect would not alone render him liable for the injury.

If inspection is a legal duty, evidently Archibald could claim nothing if he knew it was not performed. But must he exercise care to know that this duty is neglected by the master? It is not neg-

ligence to fail to anticipate that another will violate the law in a given particular and in failing to provide against such violation.

(Thompson on Negligence, vol. 2, page 1172, section 18. *Railway Company vs. Grey*, 65 Texas 32).

Even though Archibald knew the company had not on former occasions inspected these cars, if the law made inspection a legal duty he would not be authorized to anticipate that it would be guilty of further neglect. The servant is not bound to anticipate that the master will violate the law and neglect a legal duty and is not bound to provide against such anticipated neglect.

2 Thompson on Negligence, page 1172, section 18. *Railway Company vs. Grey*, 65 Texas 32. *Kellogg vs. Railway Company*, 26 Wis. 223. *Fox vs. Sacket*, 10 Allen 535. 44 Iowa 276. 44 Cal. 414. *Railway Company vs. Terry*, 8 Ohio State 570. *Frazer vs. Sears*, 12 Cal. 555. *Brown vs. Lynn*, 31 Penn. St. 510. *Dorsey vs. Railway Company*, 42 Wis. 583.

The contention that the servant must exercise ordinary care to discover and anticipate the neglect of a legal duty by the master cannot be supported by

either reason or authority. But there is still another question: Must he be held to reasonable care to discover something that did not injure him? He was not injured by the custom not to inspect these cars, but by the iron rod, loose from its fastenings, but concealed under the car, but which was forced by the motion of the cars out into the space where he was standing. If the charge had been asked, that if he saw the rod, or by ordinary care he could have seen it and known of its condition, it should have been given. But the defendant, as well as the learned district judge, seemed imbued with the idea that he was injured by the failure to inspect these cars, when at best it was only a neglect by the company of one of the means by which the master could have ascertained the condition of the cars.

The company has neglected a duty that the law fixes on it, a servant is injured by this neglect, surely the company is liable.

None of the cases cited by the learned counsel in their brief touch the question presented in this case, nor do we doubt the position they so earnestly labor to establish, viz: that the servant assumes the ordinary risks incident to the business in which he is engaged. This is clearly the law, but the neg-

lect of the master is not one of the assumed risks. The case of *Railway Company vs. Minick* is not in point, for there was no legal duty on the company to put watches at the bridge and Minick knew that none were kept. He could estimate the danger to which he was exposed and the danger from fire, and took the risk. *Hewit vs. Flint, etc.* 67 Mich., has no application here, because the party was injured by a car, run in the manner that he knew the defendants were in the habit of running them. They had the right to run the cars just as they did and Flint, if he thought it unsafe to work with them, could quit the service, but elected to remain and was injured, clearly he had taken the risk. And so with every case cited in the brief of counsel, the complaining party knew or could have known of the existence of the very thing that caused the injury, and remained in the service.

In this case the question is altogether different, here the master neglects a duty that the law fixes on him and which he cannot evade or delegate to another. He also neglects one of the best means discovered for ascertaining whether the cars are safe and the servant might have known (as is claimed) that the master was in the habit of neglecting this

means of discovering the condition of the cars, and it is now claimed that because the servant might have known that the master did not resort to inspection to discover the condition of the car that he cannot recover. If the failure to inspect caused the injury, the authorities would apply, but as it was the failure of the master to furnish safe cars for the servant to work with, and there is no pretense that the master was in the habit of furnishing unsafe cars.

The last proposition presented in the brief of counsel, is that it is not the duty to inspect unless the car is to go into a train, but if only to be switched, from one road to another and returned. We are not aware of any law that requires the master to inspect a car for any purpose, but the law does require him to furnish safe cars and a proper inspection is the best means of ascertaining when it is a safe car. The master need not inspect provided he furnishes cars that are reasonably safe.

The authorities cited in support of the proposition do not support it. We have already referred to both the Mackay and Gottlieb cases and will not discuss them further than to say they do not support the contention.

The proposition is unreasonable, that a railway company calls on its servants to handle a car, without having taken precautions to see that it safe and the servant is injured, and they say, because the car was not to go out on the road, the company is not liable.

Nor is there anything in the pretense, that the company would have to go into the yard of another company to inspect it, that is not necessary in this case because the evidence shows that the Cotton Belt road delivered the cars on the track of the defendant company and when so delivered the servants of the defendant are required to carry them and deliver them to the oil mill and when ready to carry them back and deliver them to the other company. Is it the duty of any one to furnish safe cars for this purpose? Is it per chance a case where no one is responsible to the injured servant? The Cotton Belt road was under no obligation to Archibald; it owed him no duty, but had he went on that company it would have replied, we owe you no duty and are under no obligation to you and it would be correct.

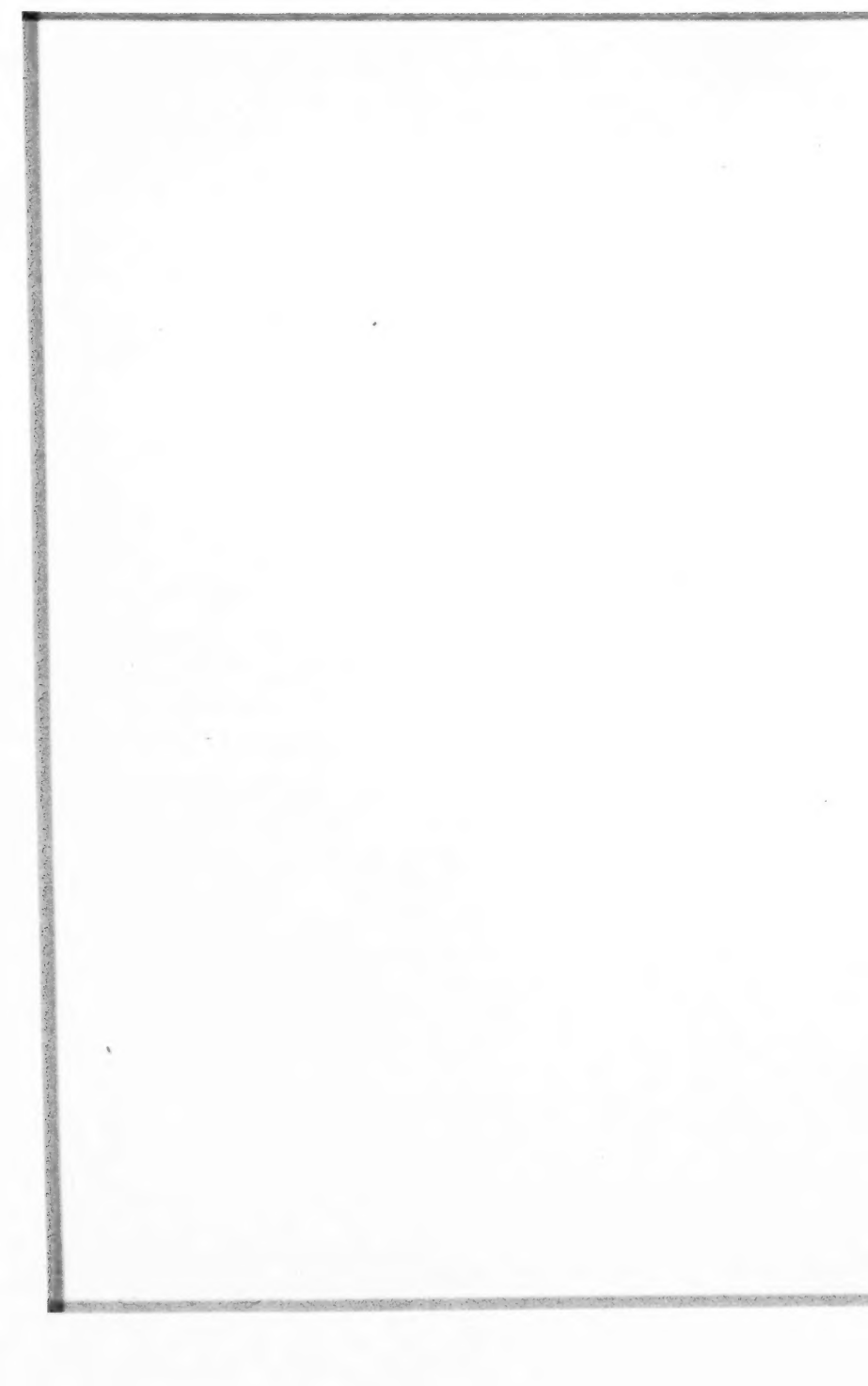
The only question it seems to us is this, did the defendant require its servants to handle these cars? The testimony of all the witnesses answers it in the

affirmative, for plaintiff was working with one of the cars, by order of the master when he was hurt. If then the master required the servant to handle the cars, the law fixes on him to see to it that the cars are reasonably safe. It does not matter how the master ascertains that the car is safe, he may inspect it or he may rely on the connecting road to furnish none but safe cars, but if he fails to furnish cars that are reasonably safe, when he requires the servant to handle them, he is liable. It matters not whether the car has to go ten feet or a thousand miles, if the master orders the servant to handle it and the car is unsafe, the master is liable.

JAS. TURNER,

J. HENRY SHEPHERD.

Attorneys.



TEXAS AND PACIFIC RAILWAY COMPANY v.
ARCHIBALD.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT.

No. 207. Submitted April 15, 1898. — Decided May 23, 1898.

It is the duty of a railroad company to use reasonable care to see that the cars employed on its road, both those which it owns and those which it receives from other roads, are in good order and fit for the purposes for which they are intended, and this duty it owes to its employés as well as to the public.

An employé of a railroad company has a right to rely upon this duty being performed, as, while in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from his employer's neglect to perform the duties owing to him with respect to the appliances furnished.

THE case is stated in the opinion.

Mr. John F. Dillon, Mr. Winslow S. Pierce and Mr. David D. Duncan for plaintiff in error.

Mr. James Turner and Mr. J. Henry Shepherd for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

This suit, commenced in a state court, was removed to the Circuit Court of the United States for the Eastern District of Texas, on the ground that the defendant was incorporated under the laws of the United States. The object of the

Opinion of the Court.

action was to recover damages for a personal injury suffered by the plaintiff whilst engaged as a switchman in the employ of defendant. On the trial by a jury there was a verdict in favor of the plaintiff, and the judgment of the trial court entered on such verdict was subsequently affirmed by the Circuit Court of Appeals for the Fifth Circuit. (41 U. S. App. 567.) To that court error was prosecuted.

The errors assigned are based entirely on the theory that the trial court erred in refusing to give to the jury certain instructions asked by the defendant, and that the Court of Appeals also fell into error in affirming the action of the trial court. To clearly understand the contentions of the plaintiff in error it becomes essential to outline the facts.

The Texas Pacific and the Cotton Belt Railway Companies both had tracks entering the city of Shreveport. These tracks of the two companies were connected. A short distance off the line of the Texas Pacific there was a cotton seed oil mill, which was united by a spur track with the main line of railroad, as it ran through a railway yard. The Cotton Belt delivered to the Texas Pacific two oil tank cars in order that they might be by the latter delivered to the oil mill, where they were to be filled and then redelivered by the Texas Pacific to the Cotton Belt to be carried to their point of destination over its line. The tank cars were placed by the Texas Pacific near the oil mill on the spur track leading thereto. At a subsequent time — there being conflict in the testimony as to how long a period intervened — one of the tank cars having been filled with oil, the mill company requested that the loaded car be moved and the empty car be left on the spur track so that it might also be filled. To accomplish this purpose an engine, with a box car, moved down the spur track to couple to the oil cars, so as to place the loaded one on the main track preparatory to delivering it to the Cotton Belt. The plaintiff, a switchman, was ordered to uncouple the loaded from the empty tank car. These cars were both fitted with an appliance by which, if in good order, the coupling pin could be removed by a lever without the necessity of the switchman going between them. This appli-

Opinion of the Court.

ance, however, on the cars in question, when the switchman sought to use it, was found to be out of order, and he was therefore compelled to lean in between the two cars to draw out the coupling pin for the purpose of uncoupling, an operation shown to be usually resorted to when necessary. As he was making this movement his feet became entangled, and he was thereby suddenly exposed to the risk of being thrown between the cars and to the danger of being crushed to death. The entanglement of the feet of the switchman was caused by a broken brake rod, with links of chain attached to it and a hook at its end, which was hanging down under one of the cars, and which, in the movement of the car, was projected out into the space between the two cars, and caught the feet and legs of the switchman as he leaned between the cars for the purpose of doing the uncoupling. In his effort to escape being thrown between the slowly moving cars the right arm of the switchman was caught between the drawheads of the cars and was so badly crushed at the elbow that amputation was rendered necessary.

There was proof tending to show that the Texas Pacific inspected the cars in use on its road, not only those belonging to it but those delivered to it from other roads, and that where a car was found out of order the inspector marked upon it the nature of the defect found to exist, thereby giving warning on the subject to those who might handle it. The uncontradicted proof was that there were no marks on the cars in question calling attention to any defect. There was proof tending to explain the absence of a mark or marks calling attention to the defective condition, by showing that the car inspector of the Texas Pacific performed his duty at a point called the junction, which was outside of the place where the tracks of the Texas Pacific and Cotton Belt were connected, and hence that where a car was delivered by the Cotton Belt to the Texas Pacific by means of the connecting track inside of the junction no inspection of such cars was made by the Texas Pacific. The proof tended to establish that this was only necessarily the case where the car delivered by the Cotton Belt to the Texas Pacific, was by the

Opinion of the Court.

Texas Pacific redelivered to the Cotton Belt by means of the connecting tracks between the two roads, because when a car was so redelivered it was not carried by the Texas Pacific over its main track to the junction where the car inspector was presumed to discharge his duties. In case of cars delivered as above stated, and which were not therefore inspected by the Texas Pacific, there was proof giving rise to the inference that that company, in view of the fact that the cars were not intended to go out over its line, relied on the inspection which it presumed had been made by the Cotton Belt. The tendency of the proof on the foregoing subject was not, however, entirely concordant, as there was some proof tending to show that the duties of the car inspector of the Texas Pacific extended not only to the inspection of cars at the junction, but also to the inspection of cars received within that point under conditions similar to those under which the oil tank cars were received.

There are six assignments of error, the first of which may be at once dismissed from view, as it simply avers that the Court of Appeals erred in affirming the judgment of the trial court, without any specification of any particular error committed. The remaining five we will consider in their logical sequence, rather than in the order in which they are pressed in the brief of counsel. The consideration of the fourth and fifth assignments involves substantially the same legal contention. The fourth rests upon the refusal of the trial judge to give the following instruction:

"The duty to inspect cars coming from other roads applies only when the car is to be sent out on the receiving road, and does not apply when cars are switched from one road to be loaded and returned to the road from which they were received."

The fifth upon a like refusal to give this instruction:

"It is the duty of a railroad company to use ordinary care in keeping the cars which their employes are called on to handle in repair, so as not to expose their employes to unnecessary danger, and this duty exists to use ordinary care to inspect cars that come from other roads to be hauled over

Opinion of the Court.

their own roads. What is ordinary care is always measured by the facts and circumstances of the particular case, and ordinary care means more care in one case than in another. The amount of care and caution to inspect cars coming from other roads to be merely loaded and returned to the other road is not so great as when the car is to be sent out of the road of the defendant, because, in the first place, the car is to be handled only by switchmen, who have a much better opportunity to observe any defect and protect themselves than the trainmen do when a car is placed in a train and sent out on the road. Now, if the defendant used ordinary care to discover and repair defects in the car in question under the circumstances in this case, then defendant is not liable."

That it was the duty of the railway company to use reasonable care to see that the cars employed on its road were in good order and fit for the purposes for which they were intended, and that its employés had a right to rely upon this being the case, is too well settled to require anything but mere statement. That this duty of a railroad as regards the cars owned by it exists also as to cars of other railroads received by it, sometimes designated as foreign cars, is also settled. *Baltimore & Potomac Railroad Co. v. Muckey*, 157 U. S. 72, 91. Said the court in that case (p. 91): "Sound reason and public policy concur in sustaining the principle that a railroad company is under a legal duty not to expose its employés to dangers arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted to its train." This general duty of reasonable care as to the safety of its appliances resting on the railroad, the instructions in question proposed to limit by confining its performance solely to such foreign cars as are received by a railroad "for the purpose of being hauled over its own road." In other words, the proposition is that where a car is received by a railroad only for the purpose of being locally handled, the railway as to such local business is dispensed from all duty of looking after the condition of the cars by it used, and may with complete legal impunity submit its employés to the risk arising from its neglect of duty. To

Opinion of the Court.

this length the proposition plainly goes, as is shown by its context, and is additionally illustrated by the argument at bar.

The argument wants foundation in reason and is unsupported by any authority. In reason, because, as the duty of the company to use reasonable diligence to furnish safe appliances is ever present, and applies to its entire business, it is beyond reason to attempt by a purely arbitrary distinction to take a particular part of the business of the company out of the operation of the general rule, and thereby to exempt it, as to the business so separated, from any obligation to observe reasonable precautions to furnish appliances which are in good condition. Indeed, the argument by which the proposition is supported is self-destructive, since it admits the general duty of the employer just stated, and affords no reason whatever for the distinction by which it is sought to take the case in hand out of its operation. The contention is without support of authority, since the cases cited to sustain it are directly to the contrary. They are: *Baltimore & Potomac Railroad Co. v. Mackey*, *supra*, and two New York cases, *Gottlieb v. N. Y., Lake Erie &c. Railroad*, 100 N. Y. 462, *Goodrich v. New York Central &c. Railroad*, 116 N. Y. 398, both of which were cited approvingly in the *Mackey case*. The theory upon which in the argument at bar it is claimed that the cases cited overthrow the very doctrine which in truth they announce, is based upon the use of the words in the *Mackey case*, "admitted into its train." Taking this as a premise, it is said the duty of a railroad to exercise reasonable diligence to furnish safe appliances exists only as to cars "admitted into its train," that is, cars which it receives and transports in one of its trains, and does not obtain as to cars which it receives and handles in its yards for local purposes only. It is obvious from a mere casual reading of both the *Mackey case* and the New York cases relied upon that the duty on the part of the railroad which they inculcate applies to all cars used by the road in its business. In addition, the case of *Flanagan v. Chicago & Northwestern Railway*, 45 Wisconsin, 98, is cited. But that case

Opinion of the Court.

gives no support whatever to the proposition. There a car, which had been broken and damaged, was put upon a spur track. To repair it, it became necessary to move it, and with the knowledge that the car was broken employ  s of the road took charge of it to remove it to the repair shop. The ruling was that under such circumstances the employ   could not recover because of the defective condition of the car, and the case therefore but illustrates the general rule already referred to.

The second and third requests to charge were as follows:

"If you believe that the defendant company had car inspectors at Shreveport, but that it was not their duty under their employment to inspect cars that came from other roads on to defendant's tracks merely for the purpose of being loaded and returned, and if the cars that plaintiff was uncoupling when he was injured had been brought from the Cotton Belt road to be loaded with oil and returned to said road, and if the plaintiff knew *or by the exercise of ordinary care could have known* that it was the custom of the defendant company not to inspect cars that were brought in, as they were, to be returned, then the plaintiff would be held to assume the risk of being injured by reason of defects in said cars, and in such case he cannot recover.

"It appears in this case that plaintiff was injured while coupling two cars that did not belong to defendant company, but had been brought from the Cotton Belt road to be loaded and returned to that road. Now, if you believe it was the custom of defendant company not to inspect or repair cars when thus brought over to be loaded and returned, and the plaintiff knew this custom *or could have known it by the exercise of ordinary care*, then he assumed the risk of being injured by any defect in said car, and cannot recover."

These requests the court gave, except in the first it omitted the words therein italicized, that is, "by the exercise of ordinary care could have known," and the second, "or could have known it by the exercise of ordinary care." The court was clearly right in striking the words from the requests. The elementary rule is that it is the duty of the employer to fur-

Opinion of the Court.

nish appliances free from defects discoverable by the exercise of ordinary care, and that the employé has a right to rely upon this duty being performed, and that whilst in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employé with respect to appliances furnished. An exception to this general rule is well established, which holds that where an employé receives for use a defective appliance, and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used. But no reason can be found for and no authority exists supporting the contention that an employé, either from his knowledge of the employer's methods of business or from a failure to use ordinary care to ascertain such methods, subjects himself to the risks of appliances being furnished, which contain defects that might have been discovered by reasonable inspection. The employer on the one hand may rely on the fact that his employé assumes the risks usually incident to the employment. The employé on the other has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because by ordinary care he might have known of the methods, and inferred therefrom that danger of unsafe appliances might arise. The employé is not compelled to pass judgment on the employer's methods of business or to conclude as to their adequacy. He has a right to assume that the employer will use reasonable care to make the appliances safe and to deal with those furnished relying on this fact, subject of course to the exception which we have already stated, by which where an appliance is furnished an employé, in which there exists a defect known to him or plainly observable by him, he cannot recover for an injury caused by such defective appliance, if, with the knowledge above stated, he negligently continues

Opinion of the Court.

to use it. In assuming the risks of the particular service in which he engages the employé may legally assume that the employer, by whatever rule he elects to conduct his business, will fulfil his legal duty by making reasonable efforts to furnish appliances reasonably safe for the purposes for which they are intended; and whilst this does not justify an employé in using an appliance which he knows to be defective, or relieve him from observing patent defects therein, it obviously does not compel him to know or investigate the employer's modes of business, under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances. In *Davidson v. Cornell*, 132 N. Y. 228, the court said:

"It is, as a general rule, true that a servant entering into employment which is hazardous assumes the usual risks of the service, and those which are apparent to ordinary observation, and, when he accepts or continues in the service with knowledge of the character of structures from which injury may be apprehended, he also assumes the hazards incident to the situation. *Gibson v. Erie Railway Co.*, 63 N. Y. 449; *De Forest v. Jewett*, 88 N. Y. 264; *Sweeney v. Berlin & Jones Envelope Co.*, 101 N. Y. 520; *Hickey v. Taaffe*, 105 N. Y. 26; 12 N. E. Rep. 286; *Williams v. Delaware, Lackawanna & C. Railroad*, 116 N. Y. 628. Those not obvious assumed by the employé are such perils as exist after the master has used due care and precaution to guard the former against danger. And the defective condition of structures or appliances which, by the exercise of reasonable care of the master, may be obviated, and from the consequences of which he is relieved from responsibility to the servant by reason of the latter's knowledge of the situation, is such as is apparent to his observation. *Kain v. Smith*, 89 N. Y. 375; *McGovern v. Central Vermont Railroad*, 123 N. Y. 280."

In *Missouri Pac. Railway v. Lehmberg*, 75 Texas, 61, 67, the court considered a refusal to give a requested instruction, that if there were "any patent defects in the engine or tank, and deceased knew, or might by ordinary diligence have known of same, and said defects caused or contributed to the

Opinion of the Court.

injuries complained of, the jury should find for defendants." The court said :

" Without now considering the question whether the rule in this respect charges an employé with knowledge of defects, except with regard to such appliances or instruments as he is engaged himself in using, we think it sufficient to say that the law does not, under any circumstances, exact of him the use of diligence in ascertaining such defects, but charges him with knowledge of such only as are open to his observation. Beyond that he has the right to presume, without inquiry or investigation, that his employer has discharged his duty of furnishing him with safe and proper instruments and appliances."

Indeed, the ultimate result of the argument of the plaintiff in error is to entirely absolve the employer from the duty of endeavoring to supply safe appliances, since it subjects an employé to all risks arising from unsafe ones, if the business be carried on by the employer without reasonable care, and the employé knew or by diligence could have known, not of the dangers incident to the business, but of the harm possibly to result from the employer's neglectful methods. Measured by the principles just stated the trial court not only did not err in striking out parts of the instructions which were asked, but in the portions given stated the law to the jury more favorably to the plaintiff in error than was sanctioned by true legal principles. The remaining assignment, the sixth, but presents, in a changed form, the questions which we have disposed of.

Affirmed.

MR. JUSTICE BREWER dissented.

